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No.

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IN THE

Supreme Court of the United States

October Term, 1982

ELIZABETH CIAFFONI COWDEN, Trustee of the Estate of PAUL CIAFFONI,

Petitioner

v.

CONCETTA CIAFFONI, ROBERT J. CIAFFONI,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Pennsylvania Supreme Court violate the Due Process Clause of the Fourteenth Amendment when it ignored its own established adjudicatory procedures, and denied to the Petitioner access to Court prior to entering an Order which deprived Petitioner of her vested property rights?

2. Did the Pennsylvania Supreme Court violate the Due Process Clause of the Fourteenth Amendment by denying to Petitioner notice and an opportunity to be heard prior to entering an order which deprived Petitioner of her vested property rights?

3. Did the Pennsylvania Supreme Court contravene the Equal Protection Clause of the Fourteenth Amendment by treating Petitioner differently than it has treated similarly situated litigants, with no rational relationship to the advancement of any state interest?

PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF PENNSYLVANIA

ELIZABETH CIAFFONI COWDEN, Trustee of the Estate of PAUL CIAFFONI, Proponent/Appellee.

CONCETTA CIAFFONI, ROBERT J. CIAFFONI, Contestants/Appellants.

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No.

IN THE

Supreme Court of the United States

October Term, 1982

IN RE: ESTATE OF PAUL CIAFFONI, Deceased
ELIZABETH CIAFFONI COWDEN, Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner above-named respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Pennsylvania entered in this case on May 20, 1982.

OPINIONS BELOW

The *per curiam* opinion of the Supreme Court of Pennsylvania dated May 20, 1982, reversing its earlier final judgment entered April 30, 1980, and reversing the decree of the Orphan's Court Division of the Court of Common Pleas of Washington County, Pennsylvania, is reported as *In re Estate of Paul Ciaffoni, Deceased: Appeal of Robert J. Ciaffoni,* — Pa. —, 446 A. 2d 225 (1982). A copy of this *per curiam* judgment order and opinion is printed in the Appendix at A1.

The *per curiam* opinion and judgment of the Supreme Court of Pennsylvania dated April 30, 1980 is reported as *In re Estate of Paul Ciaffoni, Deceased,* 491 Pa. 46 (1980). A copy of this opinion and judgment is printed in the Appendix at A4.

The Order of the Supreme Court of Pennsylvania dated June 16, 1980, denying reargument from the entry of judgment on April 30, 1980 is not reported. A copy of this Order is printed in the Appendix at A10.

The opinion of the Orphan's Court Division of the Court of Common Pleas of Washington County, Pennsylvania, dated August 27, 1979, which was upheld on April 30, 1980, but reversed by the appellate court on May 20, 1982, is not reported. A copy of this opinion is printed in the Appendix at A11.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania, reprinted in the Appendix, at A26, was entered on May 20, 1982. A timely petition for reargument was denied *per curiam* by the Supreme Court of Pennsylvania on June 10, 1982. This Court's jurisdiction is invoked under 28 U. S. C. § 1257(3).

CONSTITUTIONAL AND PROCEDURAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT XIV

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

PENNSYLVANIA RULE OF APPELLATE PROCEDURE 2542

An application for reargument shall be filed with the prothonotary within 14 days after the entry of the judgment or other order involved.

PENNSYLVANIA RULE OF APPELLATE PROCEDURE 2545

No answer in opposition or separate motion to strike an application for reargument will be received unless requested by order of the court. No application for reargument will be granted in the absence of such a request and an opportunity to submit an answer in response thereto.

. . .

PENNSYLVANIA RULE OF APPELLATE PROCEDURE 2547

Second or subsequent applications for reargument, and applications for reargument which are out of time under these rules, will not be received.

STATEMENT OF THE CASE

On April 30, 1980, the Supreme Court of Pennsylvania entered a final judgment in this case. On May 20, 1982, the Supreme Court of Pennsylvania took the unprecedented step of reversing that final judgment on the identical issue which it had conclusively determined two years before. The manner in which the Supreme Court of Pennsylvania reversed itself in this case deprived Petitioner of her property without affording to Petitioner procedural due process; and violated Petitioner's equal protection rights. First, the Supreme Court of Pennsylvania arbitrarily ignored its own established rules, which unequivocally provide for notice and an opportunity to be heard on issues to be determined, and decided an issue which was not before it on appeal, and which had not been briefed or argued. Second, the Supreme Court of Pennsylvania deprived the Petitioner of established procedural rights, which procedural rights had been accorded every other litigant who had ever appeared before that Court. The Pennsylvania Supreme Court's clear indifference to Petitioner's constitutional right to due process and equal protection of the law mandate acceptance of this case for review.

The underlying case, which prompted the Supreme Court of Pennsylvania's inexplicable and unconstitutional reversal of its earlier final judgment, concerns a challenge to the validity of the May 10, 1968 Last Will and Testament ("Will") of Paul Ciaffoni, who died on September 23, 1974, residing in Washington County, Pennsylvania. The decedent's Will was admitted to probate by the Washington County Register of Wills on December 16, 1974.[1] On December 11, 1975, Margaret Soviero, one of

1. The Will was originally admitted to probate on November 25, 1974, but the Register of Wills of Washington County, Pennsylvania never entered this on the docket. The Will was again ad-

Paul Ciaffoni's daughters, filed an Appeal from Probate questioning the authenticity of the Will. One year later, on December 9, 1976, Concetta Ciaffoni (the widow) and Robert J. Ciaffoni (decedent's son) filed their separate Appeals from Probate contesting the authenticity of the Will. These three Appeals from Probate were consolidated by Order dated January 31, 1977. On August 1, 1978, an Amended Appeal from Probate was filed by Concetta and Robert J. Ciaffoni. These three Appeals from Probate alleged that the Will was a forgery in that pages had been substituted after the Will had been signed. The authenticity of the signature of the decedent, which appeared on the last page of the Will, was never questioned at any time.

On September 18, 1978, almost three (3) years after the first Appeal from Probate had been filed, an advisory jury was empanelled and trial commenced.[2] The Honorable Earl S. Keim was specially appointed to preside at that trial. During that trial, Richard DiSalle, Esquire ("DiSalle"), the scrivener of the Will, identified each page of the Will as having been prepared by him and produced the original carbon copies of the Will which he had retained in his office. Frances Gray ("Gray"), DiSalle's secretary (and one of the subscribing witnesses to

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1. (Cont'd.)
mitted to probate on December 16, 1974, after a hearing was held to qualify Robert Ciaffoni as an Executor. For the purposes of this Petition, the latter date is accepted as the date of admission to probate.

2. Under Pennsylvania Rules of Orphan's Court Procedure in effect at the time when this case was called for trial, an advisory jury could have been empanelled to make findings of fact. The empanelling of such a jury was discretionary on the part of the trial judge.

the Will), testified that she had typed each page of the Will.

In addition to identifying each page of the Will, DiSalle also testified that the Will in probate was a revision of a prior Will of the decedent, which DiSalle had also drafted and the decedent had signed on November 29, 1967. That 1967 Will, in turn, had been based on a 1965 Will prepared by another lawyer named Patrick Derrico, Esquire ("Derrico"). DiSalle's testimony clearly established that the May 10, 1968 Will was not DiSalle's own work product –rather, he had relied in large measure on the work product of another lawyer.

In their attempt to refute the authenticity of the May 10, 1968 Will, the contestants offered to introduce, *inter alia,* three items of evidence. First, they offered the testimony of an alleged expert in linguistic styles who would have testified (1) that he had compared the decedent's Will to approximately fifty (50) other wills believed to have been written by DiSalle; and, (2) that, based on this comparison, he found linguistic and stylistic differences. This "comparison" led the contestants' expert to believe that the contested Will had been written by someone other than DiSalle. The proffered testimony was refused by the trial court because: (1) the contestants had not established that such linguistic analysis techniques had any validity, whatever; and, (2) DiSalle himself admitted having used a prior Will written by a different lawyer in preparing the May 10, 1968 Will. Quite simply, the proposed "expert" testimony would have merely corroborated DiSalle's testimony—not refuted it—and would not have been probative of any fact at issue.

The second item of evidence offered by the contestants, and rejected by the trial court, was the testimony of an alleged expert in typing characteristics. He claimed

to have compared thirty-nine "typing elements" [3] in the decedent's Will with those elements in approximately fifty other "comparison" wills supposedly written by DiSalle and typed by Gray. This proffered testimony was refused because (1) the contestants could not establish that Gray had typed all of the "comparison" wills; (2) both DiSalle and Gray testified that there was no standardized format which they used in preparing and typing wills; (3) the contestants could not establish that there was any scientific support for the comparison technique in general, or for the thirty-nine "typing elements" selected by the proposed witness as his standards for comparison; and, (4) the "comparison" wills were, at most, three pages long, while the May 10, 1968 Will was seven pages long. The contestants had again failed to lay a proper factual or scientific foundation to permit the comparison which they sought.

The third item of evidence proffered by the contestants, and also refused by the trial court, was the result of a test performed on the contested Will by the inventor of an "electrostatic detection apparatus" ("ESDA"). This machine was alleged to be capable of measuring and revealing very slight indentations in paper surfaces, such as those which occur on sheets of paper placed beneath a sheet on which writing is being done. The results of this testing purportedly showed that the indentations on the backer to the decedent's Will did not correspond precisely to the handwritten date and the signatures of the decedent and the witnesses on the last page of the will.

3. "Typing elements" are items which allegedly characterize the style of a particular typist. They include, for example, width of margins, spacing and paragraphing, the presence or absence of underscoring where blank spaces (such as date) are to be filled in, and the presence or absence of a typed name below a signature line.

However, Ordway Hilton and Paul Osborne,[4] two recognized document experts, testified, *in camera*, that they could only speculate as to why there was a misalignment. The Trial Judge properly ruled this highly speculative testimony inadmissible; and further ruled that, in any event, the ESDA had never achieved scientific acceptance in the United States.

After the contestants' proffered evidence was declared inadmissible, the contestants chose to put on no evidence. Judge Keim thereupon withdrew the case from the advisory jury and entered an Order upholding the validity of the May 10, 1968 Will. The contestants then filed Exceptions to Judge Keim's Order.

On August 27, 1979, Judge Keim entered an Order denying contestants' Exceptions, and the contestants appealed to the Pennsylvania Supreme Court.[5] The sole issue before the Supreme Court on this appeal was the correctness of the various evidentiary rulings described above. On April 30, 1980, the Supreme Court of Pennsylvania affirmed the trial court *per curiam*, with one Justice dissenting and one Justice not participating. A subsequent application for reargument in the Pennsylvania Supreme Court was denied on June 16, 1980. This Court subsequently denied the contestants' Petition for A Writ of Certiorari which was docketed on or about November 13, 1980, as *Concetta Ciaffoni, et al., Peti-*

4. Ordway Hilton was appointed by Judge Keim to act as an independent expert. Paul Osborne was the contestants' document expert. Judge Keim permitted both Hilton and Osborne to testify, *in camera*, before ruling on the admissibility of their testimony.

5. Under Pennsylvania procedure, the contestants were required to file Exceptions before perfecting an appeal to the Supreme Court. The Opinion of Judge Keim (A11) was written after briefs were filed and oral argument was held on those Exceptions.

tioners v. Elizabeth Cowden, et al., Respondents, No. 80-775.

When this Court denied the contestants' Petition for A Writ of Certiorari, and refused to review the April [illegible], 1980 judgment entered by the Pennsylvania Supreme Court, five years of litigation ended with the determination that the May 10, 1968 Will was not a forgery. The merits concerning the refusal by the Trial Judge to permit the evidence proffered by the contestants had been finally adjudicated in favor of the instant Petitioner. This Petitioner, having obtained that final judgment which vested in her, and the other beneficiaries under the Will, the property interests devised by the Will, continued to administer her late father's estate, e.g. selling and leasing various properties.

On July 25, 1980, four months before filing their Petition for A Writ of Certiorari with this Court, the contestants filed, with the Trial Court, a Motion for New Trial, *Nunc Pro Tunc.* This Motion was denied on October 2, 1980. Exceptions were filed, and the Exceptions were denied on December 16, 1980. On May 8, 1981, the contestants filed a second Motion for New Trial, *Nunc Pro Tunc,* which was denied on May 18, 1981. Exceptions were filed, and on July 2, 1981, these Exceptions were denied.

In both of those new trial motions, the contestants argued that they were entitled to a new trial because they purportedly had found "newly discovered evidence". This "newly discovered evidence" merely consisted of additional publicly filed wills and deeds, allegedly drafted by DiSalle, and which had been available at the time of the original trial.

The contestants' appealed from the trial court's denials of the two Motions for New Trial, *Nunc Pro Tunc.*

The two appeals were consolidated and heard by the Pennsylvania Supreme Court, from which proceeding springs the instant Petition. The *only issue* which was appealed to the Pennsylvania Supreme Court on these consolidated appeals was the issue raised in the new trial motions: whether publicly filed documents, available at the time of the original state court trial, constituted "newly discovered evidence" sufficient to grant a new trial. Briefs on this sole issue were duly filed, and the Supreme Court heard oral argument on this sole issue on January 18, 1982. At no time was any brief submitted, or argument made, concerning the merits of the evidentiary rulings made during the 1978 trial, which had been the subject of the Pennsylvania Supreme Court's April 30, 1980 judgment in affirmance.

On May 20, 1982, over two (2) years after its original judgment had been announced affirming the evidentiary rulings made by the Trial Judge, the Pennsylvania Supreme Court, with one Justice not participating, reversed its own prior final judgment, conspicuously avoiding any discussion of the "newly discovered evidence" issue raised by the contestants in their appeals. In reaching into the past and treating these new appeals as a second application for reargument, the Pennsylvania Supreme Court ignored its own rules which (1) set a fourteen (14) day limitation on applications for reargument,[6] (2) prohibit second and late filed applications for reargument,[7] and (3) require that, before any application for reargument is granted, the opposing side be given notice and an opportunity to oppose the grant of reargument.[8] The Pennsylvania Supreme Court did not give notice to the Petitioner

6. Pennsylvania Rule of Appellate Procedure 2542, p. 3, *supra*.

7. Pennsylvania Rule of Appellate Procedure 2547, p. 3, *supra*.

8. Pennsylvania Rule of Appellate Procedure 2545, p. 3, *supra*.

that the appeals would be treated as a second application for reargument, or give Petitioner an opportunity to submit any brief in connection with the merits of the original evidentiary issue on which it was about to render a new and contrary decision. Rather, the Pennsylvania Supreme Court, *sua sponte* granted the "second application for reargument" in direct contravention to its own rules, reversed its prior decision denying reargument, reversed on the merits its April 30, 1980 judgment, totally ignored the sole issue which was before the Court on appeal, and remanded the matter to the trial court.

Between April 30, 1980, when the Pennsylvania Supreme Court entered its first judgment on the merits of the trial court's evidentiary rulings, and May 20, 1982, when the Pennsylvania Supreme Court reversed that two-year-old final judgment, the composition of the Court had changed; two Justices who had been sitting in 1980 were no longer members of the Court in 1982. As a result, two Justices who had never had the case presented to them on the merits, and who had neither the opportunity to review the case on the merits or to read the briefs or hear argument on the merits, took part in ruling on the merits and entering an order in direct contravention of the earlier final judgment of the Pennsylvania Supreme Court.

On June 1, 1982, Petitioner herein timely filed an application for reargument with the Supreme Court of Pennsylvania. In that application for reargument, Petitioner raised, *inter alia*, the precise federal constitutional questions now presented to this Honorable Court. These constitutional claims were thus raised at the first stage in the proceedings when they became material and relevant to the disposition of this case. By *per curiam* order dated June 10, 1982, the Supreme Court of Pennsylvania summarily denied Petitioner's application for reargument.

Petitioner's Application to Stay Remand of Record Pending Review in this Court was granted following a hearing before Mr. Justice Nix of the Pennsylvania Supreme Court. A27. During the hearing on the stay application, Mr. Justice Nix stated that the Pennsylvania Supreme Court took a two-step approach in deciding this case. First, the Court decided whether to treat the contestants' consolidated appeals as a request to ignore, in this one case, its rules of procedure and allow a second application for reargument. Then, having decided to allow a second application for reargument, the Court decided to address the merits raised in the *first* appeal. Petitioner was given no notice by the Pennsylvania Supreme Court that it would ignore its own procedural rules—and was thereby precluded from presenting any argument that the Court not adopt this novel approach. Moreover, Petitioner was given no notice that the original judgment was coming under the Court's scrutiny—and Petitioner was thereby precluded from briefing and arguing the substantive evidentiary issue which was decided.

The effects of the actions taken by the Pennsylvania Supreme Court were to deprive Petitioner of the final judgment entered on April 30, 1980, and vested property rights which Petitioner had obtained based on that judgment, without notifying Petitioner that that judgment and the property rights were even in jeopardy; and, without providing to Petitioner any opportunity whatever to argue in support of the judgment and her property rights.

The instant Petition to this Court followed the Pennsylvania Supreme Court's denial of Petitioner's timely application for reargument.

REASONS FOR GRANTING THE WRIT

Of central concern in analyzing a claimed due process violation is whether the aggrieved party was afforded the legal process which was due. Conceptually the due process clause

> . . . expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Department of Social Services of Durham County, North Carolina, — U. S. —, —, 101 S. Ct. 2153, 2158 (1981). While the parameters of due process are incapable of bright-line definitional distinctions, the lynchpin for constitutional sufficiency is whether the notice given to a litigant, prior to any ultimate decision affecting that litigant's rights, is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . ." *Texaco, Inc. v. Short*, — U. S. —, —, 102 S. Ct. 781, 794 (1982) *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950). Moreover, the Due Process Clause of the Fourteenth Amendment

> . . . imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution.

Lassiter v. Department of Social Services of Durham County, North Carolina, — U. S. —, —, 101 S. Ct. 2153, 2163 (1981).

Finally, an elemental and "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Parratt v. Taylor*, — U. S. —, —, 101 S. Ct. 1908, 1915 (1981) quoting with approval from *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965).

Petitioner argues that she has not received the minimal procedural due process prescribed by this Honorable Court. The only issue properly before the Pennsylvania Supreme Court was that raised in contestants' consolidated appeals from the denials of the two Motions For New Trial, *Nunc Pro Tunc*. The only issue which was submitted, briefed and argued was whether the contestants' "newly discovered" evidence was sufficient to warrant a new trial. The fact that the Pennsylvania Supreme Court totally ignored this issue in its May 20, 1982, *per curiam* opinion bespeaks the speciousness of contestants' position. The only conclusion to be drawn is that no ground for a new trial existed.

Rather, the Pennsylvania Supreme Court chose to disturb its prior final judgment, over which it had no jurisdiction, vacate that judgment, and strip Petitioner of her vested property rights. In so doing, the Court neither notified Petitioner, nor gave to Petitioner an opportunity to be heard; and, contravened at least three established rules of Pennsylvania appellate procedure.

Pennsylvania Rule of Appellate Procedure 2542 provides that an application for reargument from the entry of judgment "shall be filed . . . within 14 days after the entry of judgment . . .". Pennsylvania Rule of Appellate Procedure 2547 provides that untimely and "[s]econd or

subsequent applications for reargument . . . will not be heard." Clearly, the consolidated appeals before the Supreme Court of Pennsylvania from the denials of contestants' new trial motions were not filed within 14 days and under the Court's own rules, which were clearly ignored, should not have been heard.

Moreover, the Pennsylvania Supreme Court ignored Pennsylvania Rule of Appellate Procedure 2545 which states:

> . . . No application for reargument will be granted in the absence of such a request and an opportunity to submit an answer in response thereto.

In short, the Pennsylvania Supreme Court not only granted reargument without notice to Petitioner and without affording Petitioner "an opportunity to submit an answer in response", it decided the merits of the questions to be reargued without holding reargument. Petitioner had no process prior to losing her vested property rights.

This Court is respectfully urged to grant the instant Writ in order to ensure that the Pennsylvania judicial system will not act to deny persons the opportunity to be heard before depriving them of their property rights; and, to ensure that all judicial proceedings be conducted in a manner consistent with basic fundamental fairness mandated by the Fourteenth Amendment.[9]

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9. As a consequence of the Pennsylvania Supreme Court's unprecedented action in this case, there are further proceedings to be conducted in this case in the Pennsylvania courts. Nonetheless, this fact does not preclude this Court from exercising its certiorari jurisdiction under 28 U. S. C. § 1257(3). This Court has created four exceptions to the "final judgment or decree" limitation with respect to appeals from state litigation. The circumstances of this case fall within the ambit of two of those judicially created excep-

When a State Court Ignores Its Own Established Adjudicatory Procedures, and Thereby Denies a Litigant Access to Court While Nonetheless Depriving the Litigant of Property, the State Action Requirement of the Fourteenth Amendment Has Been Met. There Is a Cognizable and Enforceable Due Process Claim of Entitlement

For petitioner to establish her Fourteenth Amendment due process claim, she must establish (1) that she was deprived of property, (2) that the deprivation resulted from an act of the State, i.e. the Commonwealth of Pennsylvania, and (3) that the State acted without affording her due process of law. This tripartite test has been met in this case.

The property at issue is the judgment obtained by Petitioner on April 30, 1980, and Petitioner's legitimate and vested claim of entitlement in the Estate of Paul Ciaffoni, the deceased. Petitioner, and those legatees whom she represents as Executrix, obtained a vested, immutable property interest in the Estate of Paul Ciaffoni in 1980 when the Pennsylvania Supreme Court finally determined the validity of Paul Ciaffoni's will.

As this Court stated in *Board of Regents of State Colleges v. Roth*, 408 U. S. 564, 576-577 (1972):

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9. (Cont'd.)

tions. First, if this Court finds that petitioner's federal constitutional rights were abridged, such a determination would render the pending state proceedings not only unnecessary but unlawful. Second, if this Court declines to exercise its certiorari jurisdiction, petitioner will be unable to litigate the present constitutional claims as they will not survive the proceedings in the lower Pennsylvania courts. Thus, for practical purposes of adjudication, the Pennsylvania Supreme Court's summary disposition of these federal claims is final. See *Cox Broadcasting Corporation v. Cohn*, 420 U. S. 469, 479-482 (1975).

> The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.
>
> . . .
>
> To have a property interest . . . a person . . . clearly must have more than an abstract need or desire . . . , more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect these claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is the purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Here, after the Supreme Court of Pennsylvania entered its April 30, 1980 judgment and finally upheld the Will, Petitioner, relying on that judgment and the property rights which vested as a result of that judgment, began to administer the estate, selling and leasing properties and acting in accordance with her authority as Executrix. Moreover, the legatees and trust beneficiaries under the May 10, 1968 Will obtained a vested interest in the Estate being administered. Indeed, the judgment itself was a vested property right. In relying on the Supreme Court of Pennsylvania's April 30, 1980 judgment upholding the May 10, 1968 Will, Petitioner reasonably believed that such reliance and authority could "not be arbitrarily undermined." However, the Pennsylvania Supreme Court's unprecedented action two years later brought about just such a result.

With respect to the second level of inquiry, the requisite state action, petitioner has established that the deprivation of property resulted from an act of the State. The Pennsylvania Supreme Court, and the individual Justices of that Court, are agents of the Commonwealth of Pennsylvania. Their powers and judicial authority derive from and were created by state law.[10] Judges are state officials and their actions are therefore actions attributable to the State. *See, Dennis v. Sparks*, — U. S. —, 101 S. Ct. 183 (1980); *Supreme Court of Virginia v. Consumers Union of the United States*, — U. S. —, 100 S. Ct. 1967 (1980); *Stump v. Sparkman*, 435 U. S. 349 (1978).[11] Thus, the property deprivation here alleged clearly resulted from state action.

Finally, Petitioner was deprived of her vested property rights without due process. Rule 2545 of the Pennsylvania Rules of Appellate Procedure mandates that appellate courts in the Commonwealth of Pennsylvania provide notice and an opportunity to be heard to litigants whose opponents have timely sought reargument or rehearing on a case previously decided. Under that Rule, Pennsylvania appellate courts are barred from *sua sponte* granting either reargument or the ultimate relief sought, absent affording the opposing litigant meaningful notice and a meaningful opportunity to be heard. Thus, the

10. Pennsylvania Constitution Article 5 §§ 1-2, 10 (adopted April 23, 1968).

11. Although these cases arose under 42 U. S. C. § 1983, this Court made clear during its last Term

> . . . that in a § 1983 action brought against a state official, the statutory requirement of action "under color of state law" and the "state action" requirement of the Fourteenth Amendment are identical.

Lugar v. Edmondson Oil Co. Inc., — U. S. —, —, 102 S. Ct. 2744, 2750 (1982).

State has guaranteed access to the courts by a procedure complying fully with the mandates of due process. Once the state accords access to its courts, and thereby preconditions its own authority to act, the State may not arbitrarily deny access to these "established adjudicatory procedures." As this Court stated in *Logan v. Zimmerman Brush Company*, — U. S. —, —, 102 S. Ct. 1148, 1154 (1982):

> [T]he Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right(s)." *Boddie v. Connecticut*, 401 U. S. 371, 300, 91 S. Ct. 780, 787, 28 L. Ed. 2d 113 (1971).

By violating its own "established adjudicatory procedures" and failing to afford access to the court, the Pennsylvania Supreme Court denied Petitioner her due process rights to notice and an opportunity to be heard.

A State's Highest Court Violates the Most Basic Tenets of Due Process and Fundamental Fairness When, Without Reason or Necessity, It Ignores Its Promulgated Rules and Deprives a Litigant of Property Rights Without Notice That Such Adjudication Is Being Considered, and Without an Opportunity to Be Heard

In rendering its decision in this matter, the Supreme Court of Pennsylvania arbitrarily ignored precise procedural rules which it had promulgated, totally ignored the only issue before it on appeal, and disposed of this case on an issue not submitted to it for consideration.

Indeed, the identical legal issue "decided" by the Supreme Court of Pennsylvania on May 20, 1982, had been finally decided by that same court two years earlier. By reaching for a legally unreachable issue, without notice to Petitioner and without providing to Petitioner an opportunity to be heard, the Supreme Court of Pennsylvania deprived Petitioner of the most basic tenets of due process and fundamental fairness: meaningful notice and a meaningful opportunity to be heard. By its unprecedented aversion to the constitutional process due Petitioner, the Supreme Court of Pennsylvania denied petitioner of property in direct contravention of the Fourteenth Amendment to the United States Constitution. The only remedy Petitioner has rests with this Court as the ultimate bulwark against encroachment by the States of federally secured rights.

The constitutional issue in this case is the obverse of that presented in the series of cases where the State, under the guise of an established but defective state procedural rule or statute, deprives a litigant of property rights. *See, e.g., Fuentes v. Shevin*, 407 U. S. 67 (1972); *Goldberg v. Kelly*, 397 U. S. 254 (1970); *Sniadach v. Family Finance Corporation*, 395 U. S. 337 (1969).[12] As held by this Court in those cases, Fourteenth Amendment due process mandates that notice and a hearing occur prior to deprivation.

Here, the applicable state procedural rule not only contemplates that all state litigants will receive their full panoply of procedural due process rights, but, in fact, these very rules guarantee procedural due process. Specifically, Rule 2545 of the Pennsylvania Rules of Appellate Procedure provides that a Pennsylvania appellate court

12. *See also, Lugar v. Edmondson Oil Co.*, — U. S. —, 102 S. Ct. 2744 (1982); *Greene v. Lindsey*, — U. S. —, 102 S. Ct. 1874 (1982); *Logan v. Zimmerman Brush Company*, — U. S. —, 102 S. Ct. 1148 (1982).

may neither (1) grant reargument *sua sponte* nor (2) grant the relief requested in an application for reargument, unless the opposing party has been provided an opportunity to be heard thereon.[13] Despite the unequivocal language of its own rule, the Pennsylvania Supreme Court nonetheless granted reargument in this case and then *sua sponte* granted the relief sought, and reversed its prior final judgment without ever affording Petitioner any prior notice or an opportunity to be heard.

The insidious manner in which the Pennsylvania Supreme Court chose to ignore its own established procedures had the identical effect which was declared unconstitutional in *Fuentes v. Shevin, supra, Goldberg v. Kelly, supra,* and *Sniadach v. Family Finance Corporation, supra.* The litigants in those cases successfully attacked a state procedural rule or statute as unconstitutional because the rule or statute did not provide for notice and an opportunity to be heard prior to a determination depriving those litigants of a property right.

Moreover, in order to circumvent the clear admonition of Rule 2547 of the Pennsylvania Rules of Appellate Procedure, which absolutely forbids parties from filing "second or subsequent applications for reargument," [14] the Pennsylvania Supreme Court *sua sponte* chose to treat the contestants' direct, consolidated appeals from the denial of their new trial motions, as an application for modification of its procedural rules.[15] In so doing the Pennsyl-

13. For the pertinent text of Pa. R. A. P. 2545, see p. 3, *supra.* This rule became effective on September 30, 1979, following its promulgation by the Pennsylvania Supreme Court, and was "[p]atterned after U. S. Supreme Court Rule 58(3)." Pa. R. A. P. 2545 (Note).

14. For the full text of Pa. R. A. P. 2547, see p. 3, *supra.*

15. Prior to its decision in this case, the Supreme Court of Pennsylvania had never granted a second application for reargu-

vania Supreme Court acted in derogation of its judicial responsibility and deprived Petitioner of property without due process of law.

By this petition, Petitioner seeks only the notice and opportunity to be heard which are guaranteed by the Fourteenth Amendment and which, until the action complained of here, were guaranteed by established state procedure. Petitioner asks this Court to require the State to provide the due process which has thus been denied. The manner in which the Pennsylvania Supreme Court deprived Petitioner of due process, and took from Petitioner her property, i.e., the April 30, 1980 judgment and vested property rights in the decedent's estate, mandates that this Court grant certiorari. *See, e.g., Logan v. Zimmerman Brush Company, supra.*

A State's Highest Court Offends the Equal Protection Clause of the Fourteenth Amendment When It Treats One Litigant Differently Than It Has Treated Other Similarly Situated Litigants, and When the Distinction Bears No Rational Relationship to Any State Interest

In rendering its decision in this case, the Pennsylvania Supreme Court also violated the Equal Protection Clause of the Fourteenth Amendment. Petitioner's constitutional right to equal protection required the Pennsylvania Supreme Court to treat her as fairly and in the same manner as it treated all other appellate litigants. Instead, the Pennsylvania Supreme Court inexplicably chose this occasion to create two subcategories of appellate litigants: (1) this petitioner and (2) all other persons. This classification scheme is not rationally related to any legitimate gov-

15. (Cont'd.)
ment nor had it ever modified its rules to allow the filing of such an application. As is discussed *infra*, this gives rise to Petitioner's Fourteenth Amendment equal protection claim.

ernmental purpose. The Pennsylvania Supreme Court acted in blatant violation of Petitioners' equal protection rights. *See, Schweiker v. Wilson,* 450 U. S. 221 (1981). Moreover, after creating these two discrete groups of appellate litigants, the Pennsylvania Supreme Court then accorded each group radically disparate treatment: (1) petitioner was denied the procedural due process rights prescribed by Pennsylvania's established rules of appellate procedures while (2) all other persons are accorded this procedural due process. As this Court recently reiterated:

> We have never suggested that the class of persons who might avail themselves of the equal protection guarantee is less than coextensive with that entitled to due process. To the contrary, we have recognized that both provisions were fashioned to protect an identical class of persons, and to reach every exercise of State authority.

Plyler v. Doe, — U. S. —, —, 102 S. Ct. 2382, 2392 (1982).

This Court has long recognized that equal protection mandates that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co. v. Virginia,* 253 U. S. 412, 415 (1920). Generally, the Equal Protection Clause is invoked by a party who challenges a legislative enactment as creating separate classes of persons and affording benefits to one class while denying benefits to the other class. *See, e.g., Plyler v. Doe, supra; U. S. Railroad Retirement Board v. Fritz,* — U. S. —, 101 S. Ct. 453 (1980); *Reed v. Reed,* 404 U. S. 71 (1971). Here, Petitioner does not maintain that a state procedural rule is facially unconstitutional. To the contrary, Petitioner seeks enforcement of and compliance with a facially neutral state rule of procedure which the State court has unwarrantedly abrogated in this case alone. That judicially

insupportable abrogation deprived Petitioner of equal protection because it relegated her to a sub-class where she stands alone, and where she is disparately treated for no lawfully cognizable reason.

Until its decision in the case *sub judice*, the Pennsylvania Supreme Court had consistently applied the doctrine of "the law of the case" in refusing to review its own decisions, even if that Court subsequently questioned its original ruling. *See, e.g., Commonwealth v. Tick, Inc.*, 431 Pa. 420 (1968); *Kuchinic v. McCrory*, 422 Pa. 620 (1966); *Delaware River Port Authority v. Pennsylvania Public Utility Commission*, 408 Pa. 169 (1962). This finality of judgment rule assured Pennsylvania litigants that they could rely on final decisions of that Court in conducting their legal affairs. Similarly the doctrine of "the law of the case" secured finally determined property rights against endless legal challenges raising previously decided claims.

When the Supreme Court of Pennsylvania disregarded the final "law of this case," which was established by the April 30, 1980 judgment upholding the Will of the decedent, the Court abridged Petitioner's right to be treated as similarly circumstanced litigants had always been treated by the court.

This Court recently reiterated that "[a] state-created right can, in some circumstances, beget yet other rights to procedure essential to the realization of the parent right." *Connecticut Board of Pardons v. Dumschat*, — U. S. — , — , 101 S. Ct. 2460, 2463 (1981) (citing cases). Petitioner had a "state-created" and guaranteed right to the final judgment entered in 1980 by the Pennsylvania Supreme Court. Embraced within this parent right was the corresponding procedural notion that the state could not deprive Petitioner of her vested property interest absent full compliance with the dictates of the Due Process

and Equal Protection Clauses. Nonetheless, in one swift stroke of the pen, in one brief sentence, an anonymous sitting Justice of the Pennsylvania Supreme Court erased these constitutional principles and relegated fundamental constitutional precepts to mere whim.

Thus, the Pennsylvania Supreme Court twice treated Petitioner differently from all similarly situated litigants. The first instance occurred when that Court abjured the law of this case and disregarded its conclusive finality. The second instance came to fruition when that Court denied this Petitioner the same right to be notified and heard as all other litigants are afforded when an application for reargument is under judicial consideration. Petitioner asks this Court to restore those rights which were irrationally and unconstitutionally cast aside and taken from her.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Supreme Court of Pennsylvania so that this Honorable Court may review and correct the decision below.

Respectfully submitted,

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IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Nos. 81-1-32 & 81-1-79

IN RE: ESTATE OF PAUL CIAFFONI,
Deceased

Appeal of ROBERT J. CIAFFONI
(Decedent's son)

Appeals from the decrees of the Orphans' Court Division of the Court of Common Pleas of Washington County at No. 63-74-942, dated December 16, 1980, and July 2, 1981.

ARGUED: January 18, 1982.

OPINION OF THE COURT

PER CURIAM: FILED: MAY 20, 1982

We shall treat this matter as an application pursuant to Pa. R.A.P. 105(a) for modification of the Rules of Appellate Procedure to allow a second application for re-argument. See *Aiken Industries, Inc. v. Wilson*, 482 Pa. 625, 394 A.2d 497 (1978); *United States v. Ohio Power Co.*, 353 U.S. 98, 77 S.Ct. 652 (1957). See also Pa. O.C. Rule 2.1.

On their direct appeal, appellants challenged the decree of the Orphans' Court Division of the Court of Common Pleas of Washington County upholding the validity of the probated will of decedent Paul Ciaffoni against a claim that pages of the will had been fraudulently substituted after its execution. Appellants argued that the orphans' court had improperly ruled inadmissible some forty probated wills of other decedents, both predating and postdating the decedent's will, which had been drafted by the purported scrivener of the decedent's will and typed by the scrivener's secretary. Appellants had sought to establish that elements of style common to these wills were absent from the decedent's will. The exclusion of these comparison wills resulted in the disallowance of expert testimony which would have explained the significance of the stylistic deviations. The exclusion also contributed to the disallowance of extrinsic evidence relating to the challenged will, including declarations of the testator. This Court affirmed the decree per curiam, without opinion; it then denied a petition for reargument. 491 Pa. 46, 417 A.2d 1136 (1980).*

Shortly after the denial of reargument, appellants filed a "Motion for New Trial, Nunc Pro Tunc," with the orphans' court. That motion was denied, as was a subsequent motion for a new trial. These appeals followed.

After a re-examination of the record of the will contest hearings, we are convinced that the excluded wills were properly offered in support of appellants' claim that pages of the challenged will had been fraudulently substituted. See *Lare Will*, 352 Pa. 323, 42 A.2d 801 (1945); *Kane Estate*, 312 Pa. 531, 168 A. 681 (1933). See gen-

* Mr. Justice Flaherty did not participate in the consideration or decision of the case or of the petition for reargument. Mr. Justice Roberts filed a dissenting opinion and dissented from the denial of reargument.

erally *Baldridge v. Matthews*, 378 Pa. 566, 106 A.2d 809 (1954); 1 Wigmore on Evidence § 92 (3d ed. 1940). Because there has been no final distribution pursuant to the probated will, the interests of justice require that appellants be afforded an opportunity to present their evidence of fraud to a factfinder.

Application granted. The order of this Court denying reargument is reversed; the order affirming the decree of the orphans' court is vacated. The decree of the orphans' court upholding the validity of decedent's will is vacated and the record remanded for proceedings consistent with this opinion. Costs to be borne by the estate.

Mr. Justice FLAHERTY did not participate in the consideration or decision of this case.

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 121 MARCH TERM, 1979

ESTATE OF PAUL CIAFFONI, DECEASED

APPEAL OF: Concetta Ciaffoni, (decedent's widow), Robert J. Ciaffoni (decedent's son), and Margaret Ciaffoni Soviero (decedent's daughter)

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of COMMON PLEAS OF WASHINGTON County, be, and the same is hereby affirmed.

By THE COURT:

/s/ SALLY MRVOS
Sally Mrvos, Esquire
Prothonotary

Dated: April 30, 1980

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 121 March Term 1979

IN RE:
ESTATE OF PAUL CIAFFONI, DECEASED

APPEAL OF:
CONCETTA CIAFFONI, DECEDENT'S WIDOW, ROBERT J. CIAFFONI, DECEDENT'S SON, and MARGARET CIAFFONI SOVIERO, DECEDENT'S DAUGHTER

Appeal from the Decree of the Orphans' Court Division of the Court of Common Pleas of Washington County, at No. 63-74-942

Entered: September 11, 1979

OPINION

FILED: APRIL 30 1980

PER CURIAM:

Decree affirmed. Each party to pay own costs.

Mr. Justice Flaherty took no part in the consideration or decision of this case.

Mr. Justice Roberts filed a dissenting opinion.

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 121 March Term 1979

ESTATE OF PAUL CIAFFONI, Deceased

APPEAL OF CONCETTA CIAFFONI, Decedent's widow, ROBERT J. CIAFFONI, Decedent's son, and MARGARET CIAFFONI SOVIERO, Decedent's daughter

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Appeal from Order of the Orphans' Court Division of the Court of Common Pleas of Washington County, Pennsylvania, at No. 63-74-942

DISSENTING OPINION

FILED: APRIL 30 1980

ROBERTS, *J.*

This is an appeal from the probate of the will of decedent Paul Ciaffoni. Presented is the question whether evidence of fraud proffered by appellants was improperly ruled inadmissible by the orphans' court. The majority of this Court finds no error in this evidentiary ruling and summarily affirms. I dissent.

Paul Ciaffoni, a resident of Washington County, died on September 23, 1974. Decedent's widow Concetta Ciaffoni, seven children and twenty-three grandchildren survived him. Appellants Concetta Ciaffoni and two children, Robert J. Ciaffoni and Margaret Ciaffoni Soviero, challenged probate of a document dated May

10, 1968. They alleged that certain pages of the seven page document had been fraudulently substituted following execution. At the probate hearing, appellants sought to establish their allegation of fraud by introducing approximately forty previously probated wills, drafted by the same scrivener and typed in the scrivener's office, to show discrepancies between these comparison wills and the document offered for probate. The orphans' court excluded this evidence, withdrew the case from the advisory jury and entered a decree in favor of the validity of the challenged document. Appellants took this appeal from the decree.

The orphans' court excluded the forty previously probated comparison wills because, in its view, testimony of the scrivener made it "obvious that any differences in typing or word use that the jury may have found among all those wills simply have no probative value in the Ciaffoni case." It is not disputed, however, that the scrivener drafted the probated comparison wills. Furthermore, the proponents of the will offered the testimony of the scrivener and his secretary that they prepared the challenged document now offered for probate.

This record and the previous decisions of this Court satisfy me that the orphans' court's exclusion of the probated comparison wills was erroneous. In deciding the question of admissibility, the court must consider whether the evidence sought to be admitted has probative value and is material to the issues in the case. I Wigmore on Evidence, § 10 (3d ed. 19040). Appellants offered the probated comparison wills as evidence of the scrivener's established practice in drafting testamentary documents. As this Court has stated, "[o]f the probative value of a person's habit or custom, as showing the doing on a specific occasion of the act which is the subject of the habit or custom, there can be no doubt." *Baldridge v. Mat-*

thews, 378 Pa. 566, 570, 106 A.2d 809, 811 (1954) (quoting, I Wigmore on Evidence, § 92 (3d ed. 1940)). Accord, McCormick on Evidence, § 195 (2d ed. 1972). In this case, appellants' introduction of a large number of probated comparison wills would permit the fact-finder an opportunity to compare the allegedly substituted pages of the document offered for probate with this scrivener's previously probated wills. Surely this evidence is probative on the material issue of fraudulent substitution of pages presented in this case. See also Moore, *Testimony of the Expert Document Examiner*, 22 U. Pitt. L. Rev. 675 (1961). Thus, the orphans' court's improper exclusion of this evidence denied appellants their right to establish the issue of fraudulent substitution of pages, and precluded the factfinder from exercising its function of examining these probated comparison wills and determining the genuineness of the allegedly substituted pages.

The orphans' court's exclusion of this evidence is contrary to the rulings of this Court in *Lare Will*, 352 Pa. 323, 42 A.2d 801 (1945) and *Kane's Estate*, 312 Pa. 531, 168 A. 681 (1933). In *Lare Will*, this Court similarly compared typewriting samples in deciding that a substantial factual dispute had been raised by this evidence and that the orphans' court improperly "assumed the province of [the] jury" in deciding the issue. Such evidence was considered sufficiently probative to require consideration by the fact-finder. Likewise in *Kane's Estate*, this Court approved use of typewriting samples for comparison with a challenged document. It is clear from this Court's decision in *Kane's Estate* that the comparison evidence was considered probative and material as we held that evidence sufficient to support the Chancellor's findings. See also 42 Pa.C.S. § 6111 (expert testimony permitted to make comparison of documents).

Until today's order, this Court's rule in cases involving fraud has always permitted the widest possible latitude in the admission of evidence. *Young Estate*, 347 Pa. 457, 32 A.2d 901 (1943); *Lappe v. Gfeller*, 211 Pa. 462, 60 A. 1049 (1905). Because the probated comparison wills appellants sought to introduce have probative value with respect to appellants' allegation of fraud under these decisions it is clear that the orphans' court erred in excluding this evidence. Additionally, appellants attempted to establish fraud by introducing expert testimony regarding the misalignment of indentations on the backer of the document offered for probate, statements of the decedent regarding the provisions of the document, and statements of a beneficiary regarding that individual's understanding of the testamentary dispositions. In light of my views on the issue of excluding evidence of probated comparison wills, I do not address the merits of these issues.

Accordingly, I would vacate the decree and remand for a new probate hearing.

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

SALLY MAVOS
Prothonotary
IRMA T. GARDNER
Deputy Prothonotary

801 City-County Building
Pittsburgh, Pa.
15219

June 26, 1980

Mr. Robert J. Ciaffoni
311 Crawford Street
Canonsburg, PA 15317

In Re: Estate of Paul Ciaffoni, deceased
No. 121 March Term, 1979

Dear Mr. Ciaffoni:

The Court has entered the following order on your Application for Reargument:

6/16/80
Denied.

By The Court

Mr. Justice Roberts would grant."

Very truly yours,
/s/ IRMA T. GARDNER
Deputy Prothonotary

ITG:ml
cc: Milton D. Rosenberg, Esq.
Richard Sprague, Esq.
Robert L. Ceisler, Esq.
Joseph M. Ludwig, Esq.
James R. Beam, Esq.

P.S. This is to replace the letter of June 24, 1980 which was inadvertently put on Superior Court letterhead.

IN THE
COURT OF COMMON PLEAS
OF WASHINGTON COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

No. 63 74 942

IN RE:
ESTATE OF PAUL CIAFFONI, Deceased

OPINION AND DECREE

BY THE COURT,

(OPINION BY KEIM, *J.*)

This matter is presently before the Court upon exceptions filed on behalf of contestants excepting to various evidentiary rulings as well as the Order of Court withdrawing the case from the Jury, dismissing the appeals from probate, and finding in favor of the probated document.

I. HISTORY OF THE CASE

Paul Ciaffoni died on September 23, 1974, a resident of Washington County, Pennsylvania, survived by his widow, Concetta Ciaffoni, by seven children and twenty-three grandchildren.

On December 16, 1974, the Register of Wills of Washington County admitted to probate a document dated May 10, 1968, which was offered for Probate by Elizabeth Cowden. Letters testamentary were granted to Elizabeth Ciaffoni Cowden and Concetta Ciaffoni. Robert Ciaffoni disqualified himself from being a co-executor. December 11, 1975, decedent's daughter, Margaret Ciaffoni Soviero, filed her appeal from probate. On December 9, 1976,

decedent's widow Concetta Ciaffoni, and defendant's son, Robert Ciaffoni, filed their separate appeals from probate. By Order entered January 31, 1977, Judge Paul A. Simmons, then presiding over the Orphans' Court Division of Washington County ordered the appeals filed by Concetta Ciaffoni and Robert Ciaffoni consolidated with the appeal of Margaret Ciaffoni Soviero.

On August 1, 1978, an amended appeal from Probate of Decedent's will was filed on behalf of Concetta Ciaffoni and Robert J. Ciaffoni.

On October 18, 1977, Judge Simmons disqualified himself from presiding at the hearing of this will contest, subsequently the Supreme Court of Pennsylvania appointed this Court to specially preside over the will appeal.

An advisory jury was impaneled to hear the appeal and trial began September 18, 1978, continuing until September 25, 1978. Proponents produced the attorney-scrivener, the Honorable Richard DiSalle, now a Judge of the Commonwealth Court of Pennsylvania. Judge DiSalle identified all the pages of decedent's will presently on file as written by him according to directions and descriptions of the testator, Paul Ciaffoni. Judge DiSalle testified that decedent's Will consisted of a series of revisions made by Paul Ciaffoni to a prior Will of his dated 1967 and also written by Judge DiSalle. The 1967 Will itself was based upon Paul Ciaffoni's prior 1965 Will written, not by Judge DiSalle, but by an attorney named Patrick Derrico. Judge DiSalle further testified that in January of 1968, Paul Ciaffoni came to Judge DiSalle's office to make changes in the 1967 Will. Judge DiSalle produced two yellow note sheets and a copy of the 1967 Will containing more notes of decedent's instructions on the disposition of his property. Judge DiSalle then related how decedent changed dispositions of his property among his various family members. Judge DiSalle's then secre-

tary, Francis Gray, typed the new Will and made two copies which remained in the Judge's law office.

Judge DiSalle further testified that on May 10, 1968, he went to an accountants' meeting at decedent's office. After that meeting, decedent decided to sign his Will, so Judge DiSalle instructed his secretary to bring the Will to decedent's office. The changes were read to decedent. Judge DiSalle then assembled the other subscribing witnesses, after which the testator signed his Will.

Proponents called the two other subscribing witnesses, Patricia McFarlane and Francis Gray. Mrs. Gray testified that she brought decedent's Will to his office in response to a telephone call from Judge DiSalle. She stated the decedent signed the Will in her presence with the other two subscribing witnesses attending. Mrs. McFarlane then an employee at decedent's office, also testified to decedent's execution of the Will in the presence of herself, Judge DiSalle and Francis Gray. Each subscribing witness is disinterested, receiving nothing under decedent's Will.

Contestants offered no evidence to challenge the validity of decedent's signature. Contestants offered testimony of alleged experts propounding unproven and concededly "novel" theories, which was ruled inadmissible. Results offered by contestants from a machine developed within several months of trial were similarly excluded. Contestants' offer of decedent's declarations on the issue of forgery was also rejected because contestants could offer no independent admissible evidence of forgery.

Contestants then elected to rest their case.

Since no issue of fact was then in contest, the Court withdrew the case from the advisory jury, dismissed the appeals from probate, and entered an Order in favor of the validity of the probated Will of Paul Ciaffoni.

At that time, this Court directed that argument on contestants' exceptions proceed before a Court en Banc consisting of this Court sitting alone. Exceptions were filed by contestants on December 29, 1978. The Court then set February 21, 1979 for oral arguments on its exceptions. Briefs were subsequently submitted and the Court has reviewed those briefs and considered oral arguments made.

II. Discussion

1. In their first exception, contestants object to the exclusion of over fifty wills they claim were prepared by Judge DiSalle and typed by Francis Gray. The contestants claim that the admission of these other wills was for the purpose of comparing traits and authorship between the will at issue and these other fifty wills.

First, contestants made no showing that each of those wills was typed by Mrs. Gray. The testimony showed that Mrs. Gray had no regular schedule for taking vacations and that she was replaced by substitutes when she went on vacation or was ill. It would be impossible for the Jury to reach meaningful conclusions as to Mrs. Gray's typing style on the basis of samples that may not even have been typed by Mrs. Gray.

Secondly, that a jury could readily observe and make comparisons among all of these wills as contestants claim is highly doubtful. Contestants point to no clearly distinguishable habits of either Judge DiSalle or Mrs. Gray as standards for comparison. The comparison documents, themselves, are not written by using characteristic and identifiable expressions of speech, but rather are written in formal legal style using legal terms of art. Further, the testimony showed that Mrs. Gray actually altered her typing habits for longer documents. The Ciaffoni Will is seven pages long as compared with the wills offered by

contestants which are typically two or three pages long. Similarly, Judge DiSalle testified that there was no set style, form or practice established for typing in his office; to the contrary, he offered to produce papers from his office showing discrepancies in typing style.

In light of that testimony, it is obvious that any differences in typing or word use that the jury may have found among all those wills simply have no probative value in the Ciaffoni case. Since the testimony show that differences in typing and word use should be expected, no logical inferences are possible from the discovery of any differences among the wills offered for examination. In particular, no inference as to the identity of the scrivener or the typist of decedent's will could properly have been drawn.

Further, the confusion and delay which would result from such evidence is itself grounds to exclude that evidence. In their examination of all those wills, the jurors' attention would have been distracted from the primary issue of the trial which was the validity of one will, decedent's will, to myriad collateral issues concerning over fifty wills. Certainly, the author and typist of each of those more than fifty wills would have had to be established before the wills could have been used by the jury as a basis of comparison. Thus, the jury would have had to make a finding on those issues for each of the more than fifty wills before making its findings as to the authorship and the identity of the typist of decedent's Will.

Contestants' claim that the Court's ruling was contrary to law overlooks fundamental distinctions between their only cited case, *Kane's* estate, 312 Pa. 531 (1933), and the *Ciaffoni* case. In *Kane,* supra, an actual courtroom demonstration by the alleged typist showed his typical way of accommodating to a deficiency in a particular

typewriter. It was this directly observed characteristic, reinforced through other documents, that the Court used as a basis to compare the typing on the questioned document. No such directly observable characteristics were available in the *Ciaffoni* case, rather, the jury would have seen only a mass of documents with no standard to use for its comparisons.

In addition, it should be noted that the will in question was apparently styled after a prior will drafted for decedent by another attorney. Therefore, the Court believes the other wills offered by contestants could not be compared to the will in question and would be without probative value.

2. The second question raised by contestants in their brief deals with Exceptions two, three and four, which basically deals with the Court's refusal to admit testimony of experts as to the typing and linguistic style in the questioned will compared with all other Di-Salle-Gray probated wills.

Exception 2 summarizes the offer by contestants to produce testimony by Jon A. Shank, a professor of business typing, as to his expert analysis of 39 typing elements in the questioned document of May 10, 1968 (and in the alledged prior document of November 29, 1967) with the other Di-Salle-Gray wills, dated both prior to and subsequent to May 10, 1968, which evidence the Court refused.

Exception 3 summarizes contestants' offer to produce testimony by Andrew Q. Morton, an expert whose testimony has been ruled admissible in criminal cases in England. Andrew Q. Morton examined all other Di-Salle-Gray wills, both prior to and subsequent to May 10, 1968 and compared the use of language in those documents with both the May 10, 1968 questioned document and the November 29, 1967 document and concluded that "the

habits in the disputed will of May 10, 1968 and the draft will of November 29, 1967 are so different that these cannot be regarded as a product of the Di-Salle-Gray combination." The Court refused to admit such testimony.

Exception 4 sets forth contestants' offer to produce the testimony of Robert Parslow, a professor of linguistics, who compared the same documents and analyzed the consistency or lack of consistency in the use of capital letters in legatees' names, the manner in which real estate is described, and in the use of such phrases as "in fee simple", "give, devise and bequeath", "known as" and the words used in the mineral reserve clause. Again, the Court refused such evidence.

Contestants offer Jon A. Shank for his analysis of thirty-nine typing elements. Contestants, however, do not state whether each of the comparison wills as well as decedent's Will contain all of those elements. Certainly, a typing element that occurs once in one comparison will but occurs somewhat differently in decedent's will proves absolutely nothing. Further, contestants never discuss in their offer of proof whether their list of thirty-nine elements is in fact a complete list of all elements necessary to properly identify a typist.

Robert Parslow is offered for his analysis of the occurrence of seven phrases in the comparison wills and in decedent's Will. As with Shank, whether analysis of only those seven phrases suffices to infer authorship is missing from contestants' offer of proof. Further, it is doubtful that Parslow, and, for that matter, each of the other experts, compared decedent's Will with every other known will prepared by Judge DiSalle and typed by Francis Gray, as contestants claim, since, in their offer of proof as to each expert, contestants cite the number of comparison wills as forty-seven, (forty-one predating decedent's Will, six postdating that Will), while fifty-six wills are listed by

contestants in their offer of proof of the wills. Andrew Q. Morton's testimony was offered for his comparison of the "use of language" in the comparison wills and decedent's will and for his conclusions as to differences in "habits" he claims to have found. Utterly no attempt was made by contestants in their offer of proof to specify which uses of language were examined by Morton, which so-called "habits" were discovered, or even how Morton determined a "habit" from a "non-habit".

Contestants' statement that no attack was made upon the qualifications of the witnesses is misleading in its implications. The issue of the qualifications of these "experts" was never reached because the evidence was excluded on other grounds.

Contestants offer two arguments for the admissibility of their evidence; first, that there is statutory authority for the admission of that evidence, and, secondly, that four cases cited by them shows that "similar" evidence had been admitted before in other will contests. However, neither of those arguments can withstand scrutiny.

The statutes cited by contestants do not support the admission of contestants' evidence because those statutes merely change the prior law that experts were not competent to compare disputed with admittedly genuine handwriting. *Foster v. Collner*, 107 Pa. 305 (1884). See *Travis v. Brown*, 43 Pa. 9 (1892); in re *Rocky's Estate*, 155 Pa. 453 (1893). However, those statutes do not affect the other requirements of admissibility of scientific evidence which contestants' evidence violate such as the necessity to show the reliability of the scientific principles used by experts and to show the reliability of the techniques an expert has employed.

In short, the problems with the proposed "expert" testimony offered by contestants goes directly to the reli-

ability of the techniques used by contestants' experts in forming their conclusion in the instant case. Contestants' inability to supply the Court with information sufficient to make a judgment as to the validity and reliability of techniques employed by their "experts" as well as to make a judgment as to the reliability of the scientific principles used, compels exclusion of the testimony by each of contestants' "experts".

The third question raised by contestants in their brief, deals with Exception No. 5.

In Exception No. 5, contestants argue that the Court improperly excluded the testimony of Robert Freeman and the results of tests on the ESDA machine and the testimony of Paul Osborn concerning indentations found on the backer of decedent's Will.

Although this Court was favorably impressed with the ESDA machine test, it is clear that the results of the ESDA machine's operations are at present inadmissible.

The work product of the ESDA machine is inadmissible because the ESDA cannot meet the standard of general acceptance in the scientific community required by the Supreme Court of Pennsylvania in *Commonwealth v. Topa*, 471 Pa. 223 (1977).

Furthermore and of more significance to this Court, both the testimony of Mr. Freeman and Mr. Osborn is inadmissible for the reason that both men agree that the evidence produced by the ESDA machine could have been interpreted in either of two ways.

At an in camera hearing held September 20, 1978, contestants' expert, Paul Osborn, testified as follows in response to questioning by counsel for contestants:

> "Q. Mr. Osborn, with respect to the misalignment, both horizontal and vertical, of all the writing on page seven, with the indentations of the writing

on page seven, one with another, have you any explanation as to how much misalignment could occur?

A. Yes.

Q. Is there more than one explanation for such misalignment?

A. Yes.

Q. Could you tell us whatever number of explanations occur to you, explaining each one of those possibilities to us?

A. Yes.

Q. Would you please?

A. One, it occurs to me from examining the original will in its present state, bound with three grommets at the top, that pages seven and the backing are of such a nature that page seven and the backing can be moved in various directions very simply, despite the fact that they are bound, and that five different writings, including the date and four signatures, could quite possibly have caused a variance in the indentations on the backing when they were written on page seven, despite the fact that page seven and the backing were grometted together in their position. The other explanation is that these variances in the indentations on the backing as compared to the signatures could have been due to the fact that the pages were not bound together with the backing in its present condition. In any event, the variations in the backing as compared to the signatures are each unlike the other variations, as each lineup is made. And as a result of that, I find no real evidence indicating what the situation was when those signatures were made.

Q. You could not choose between those two possible Alternatives?

A. No.

In light of Paul Osborn's testimony, the Court's exclusion of that evidence is not contrary to *Kane's Estate:* 312 Pa. 531 (1933), *Lare Will,* 352 Pa. 323 (1945); or *Cutler Estate* (No. 2), 33 D & C 2d 682 (1964), cited by contestants at pages 20 and 21 of their brief. Contestants cite those cases as authority for the admission of evidence of misalignment in the instant case. However, those cases are simply inapplicable to the *Ciaffoni* case because the issue in the instant case is the relevance of those misalignments found on Freeman's ESDA machine to proving any fact in the case at bar, not the general admissibility of such evidence.

The fourth question raised in contestants' brief corresponds with Exception No. 6, which deals with exclusion of declarations of the decedent offered on the issue of forgery. Contestants argue that they should have been permitted to offer evidence of statements by the testator that he never signed any document containing provisions which exist in the question probated document. The rule to which contestants refer, and which the Court applied, is stated in the case of *Swope v. Donnelly,* 190 Pa. 417 (1899), and *Herster v. Herseter,* 122 Pa. 239 (1889) as follows:

> ". . . . proof of declarations (of the decedent) was not in itself sufficient either to establish the execution of the will, or to overcome the testimony of the subscribing witnesses, and that it was admissible only for the purpose of corroboration." *Swope v. Donnelly,* 180 Pa. 417, 418.

In short, those cases cited by contestants in their brief are inapposite and therefore provide no support for contestants' argument. Furthermore, this Court believes

that there is no support for contestants' theory that the proponents waived the *Swope* rule, or that proponents case in chief is a mass of contradictions and inconsistencies as is argued by contestants in their brief.

The fifth question raised by contestants in their brief corresponds with Exception No. 7 which contends that it was error by the Court to refuse evidence that a proponent and chief beneficiary of the questioned document made declarations contrary to the document and to surrounding circumstances as of May 10, 1968.

It should be noted at the outset that Patricia McFarlane's answer to a question asked by counsel for contestants makes consideration of contestants' exception number seven of merely academic interest. When asked by counsel for contestants whether she had discussions with Elizabeth Cowden concerning what Mrs. Cowden expected to receive under decedent's will, Mrs. McFarlane said, "No." Thus, contestants can hardly complain that it was the Court's ruling that precluded them from introducing evidence of Mrs. Cowden's statements at that point in the trial. Further, contestants are incorrect when they claim that the Court 'precluded' them from introducing evidence of statements of that beneficiary since the Court specifically stated it would permit that evidence at a later point in the trial after a foundation for its relevance had been laid.

Evidence of what a beneficiary under Decedent's Will thinks she may or may not be receiving has utterly no relevance to the issues in the *Ciaffoni* case, and was properly excluded. That a beneficiary may be told, perhaps falsely, by a decedent to expect to inherit certain property is no evidence that decedent's Will is a forgery. Further, the use of statements of interested parties in *Lappe v. Gfeller*, 211 Pa. 462 (1905) cited by contestants as authority for the introduction of Mrs. Cowden's statements,

is of no help to them for two reasons. First, as contestants note in their brief at page 34, in *Lappe, supra*, it was after proponents' case in chief that contestants were permitted to introduce statements of interested parties to show forgery. However, in the *Ciaffoni* case, contestants sought to introduce statements of an interested party at the very outset of proponents' case and before any ground had been laid for its relevance. Secondly, *Lappe, supra*, permitted the use of statements and facts of interested parties in clearly limited circumstances not found in the *Ciaffoni* case. At 211 Pa. 470, the Supreme Court said:

> "The paper itself, having been destroyed by Mrs. Morgenroth, *was not produced* at the trial and hence there was *no opportunity to attack by direct testimony the genuineness of the decedent's signature.* It therefore became necessary for those denying the legality of the paper, and in fact *the only proof* against its validity they could produce was, to show the circumstances, acts and declarations of the interested parties bearing on its validity and genuineness." (Emphasis added)

Contestants sixth and final issue raised in their brief, which corresponds with Exception No. 8, complains that the Court erroneously precluded the contestants from introducing evidence that in the same year, the questioned document was allegedly executed (May 10, 1968), the attorney-scrivener of the questioned document permitted or caused to be filed in the Office of the Clerk of the Orphans' Court of Washington County, a document he knew bore a forged notarization, which document was dated July 17, 1968.

At trial, however, contestants offered the document in order to "give some light on things that were going on in that office that Mrs. Gray knew nothing about." How-

ever, that Mrs. Gray knew or didn't know things happening in the office where she worked bears absolutely no relevance to the issues in the *Ciaffoni* case. Mrs. Gray testified to decedent's execution of his will, which she attended, and to her typing of decedent's Will. That Mrs. Gray may have been ignorant of other matters in her office does not effect her testimony in the slightest. Further, Mrs. Gray's ignorance of other matters in her office has not the slightest significance in proving or disproving whether pages in decedent's Will were substituted. Therefore, the Court properly sustained proponents' objection and excluded this evidence.

Consistent with the foregoing discussion, it is the opinion of this Court that contestants' exceptions to the Court's Order Dismissing the Appeals and upholding the validity of the probated document is denied.

IN THE
COURT OF COMMON PLEAS
OF WASHINGTON COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

No. 63 74 942

IN RE:

ESTATE OF PAUL CIAFFONI
Deceased.

ORDER

AND Now, to wit, this 27th day of August, 1979, upon due and careful consideration of the Arguments and Briefs filed herein by both proponents and contestants, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Exceptions filed herein are hereby denied.

By THE COURT,

/s/ EARL S. KEIM *P.J.*

ATTEST:

Clerk

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Nos. 81-1-32 and 81-1-79

IN RE: ESTATE OF PAUL CIAFFONI,
Deceased

APPEAL OF ROBERT J. CIAFFONI
(Decedent's Son)

Appeals from the decrees of the Orphans' Court Division of the Court of Common Pleas of Washington County at No. 63-74-942, dated December 16, 1980 and July 2, 1981.

ARGUED: January 18, 1982.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that Application is granted. The order of this Court denying reargument is reversed; the order affirming the decree of the orphans' court is vacated. The decree of the orphans' court upholding the validity of decedent's will is vacated and the record remanded for proceedings consistent with this opinion. Costs to be borne by the estate.

By THE COURT:

/s/ IRMA T. GARDNER
Deputy Prothonotary

Dated: May 20, 1982.

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Nos. 81-1-32 and 81-1-79

IN RE:
ESTATE OF PAUL CIAFFONI,
Deceased

Application of Elizabeth Ciaffoni Cowden, Trustee, for Stay of Record Pending Review in the Supreme Court of the United States

ORDER

AND Now, to wit, this 23rd day of July, 1982 it is hereby ordered that a stay be entered and the record in the Will contest is to remain with the Prothonotary of the Supreme Court for a period of ninety (90) days from this date, during which time the proponents of the Will will have the opportunity to file a petition for certiorari with the United States Supreme Court from our decision entered May 20, 1982 and to seek a stay of further proceedings pending the disposition of that petition by the United States Supreme Court.

If the United States Supreme Court fails to grant a stay within this 90-day period, this stay will expire at the expiration of the stated ninety (90) days.

This stay does not preclude the continued administration of the Estate. It is intended merely to forestall any further action in the Will contest.

/s/ NIX, *J.*

Office - Supreme Court, U.S.
FILED
OCT 28
ALEXANDER L. STEVAS
CLERK

No. 82-428

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

IN RE: ESTATE OF PAUL CIAFFONI, Deceased

ELIZABETH CIAFFONI COWDEN, Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENTS' BRIEF IN OPPOSITION

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Appendix A-1

Excerpts from the brief submitted on behalf of Elizabeth Cowden (Appellee below; Petitioner herein) before the Pennsylvania Supreme Court in January, 1982, in support of her position overturned by the May 20, 1982 judgment of the State Supreme Court here at issue A1-A11

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-428

IN RE: ESTATE OF PAUL CIAFFONI, Deceased

ELIZABETH CIAFFONI COWDEN, Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Concetta Ciaffoni and Robert J. Ciaffoni, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Supreme Court of Pennsylvania entered in this case on May 20, 1982.

Opinions Below

Referenced and Reproduced in Petition for Writ of Certiorari, p. 2.

Jurisdiction

This Court lacks jurisdiction in that:

a. The instant petition for writ of certiorari is not timely.

b. No issue arising under any title, right, privilege or immunity has been properly set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States, as required by 28 U.S.C. §1257 (3).

These issues are developed in the body of the following brief.

Questions Presented for Review

Were the Petitioner's Constitutional Due Process or Equal Protection rights contravened when the Pennsylvania Supreme Court granted a motion for new trial, treating it as a second application for reargument, vacating a prior decision, and determining that documentary evidence of fraud possessed

probative value in a will contest, thereby remanding the matter for a complete re-trial?

Procedural Provisions Involved

Pennsylvania Rule of Appellate Procedure 105 (a):

> In the interest of expediting decision, or for other good cause shown, an appellate court may,... disregard the requirements or provision of any of these rules in a particular case...on its own motion and may order proceedings in accordance with its direction.

Statement of the Case

In essential outline, the chronology of lower court proceedings which brings the matter to this point is as follows:

1. September, 1978: Pennsylvania Orphans' Court (Judge Earl S. Keim) rules that documentary evidence of routine practice lacks probative value in a will contest. Challenged will upheld in view of lack of admissible evidence.

2. August 27, 1979: Pennsylvania Orphans' Court (Judge Earl Keim) dismisses exceptions to its rulings, affirming its earlier ruling that the documentary

evidence of routine practice lacked probative value.

3. April 30, 1980: The Pennsylvania Supreme Court affirmed the Orphans' Court ruling, per curiam, without a written opinion. Justice Roberts filed a vigorous dissent citing long-established Pennsylvania precedent supporting the probative value of the excluded evidence and urging wide latitude in uncovering fraud. The ruling noted that Justice Flaherty did not participate in the consideration or decision of the case.

4. June 16, 1980: The Pennsylvania Supreme Court denied an application for reargument without comment. Justice Roberts indicated he would grant the application.

5. November 13, 1980, a petition for writ of certiorari was docketed with the U.S. Supreme Court. This Court denied the application, presumably on the grounds that no substantial federal question was presented, although the petition claimed due process of law violations.

6. July 25, 1980 and May 8, 1981, motions for new trial, nunc pro tunc, were filed with the Pennsylvania Orphans' Court. These motions requested a new trial on three grounds:
   a. after-discovered evidence, of similar type, confirmed the probative value of the earlier documentary evidence.

b. perjury constituting a fraud upon the court had led to the earlier evidentiary rulings.

c. due process rights of the will contestants had been violated, through the denial of their right to a fair and impartial tribunal on appeal.

The Orphans' Court dismissed these motions summarily, without hearing. Appeals were taken.

7. December 22, 1981: following consolidation of appeals, the matters were transferred to the Pennsylvania Supreme Court for disposition. Motions to Quash the appeal, on grounds of the finality of the earlier decision were denied. The Pennsylvania Supreme Court established a briefing schedule and set January 18, 1982 for oral argument on the several issues raised on the motions for new trial, nunc pro tunc.

8. May 20, 1982: The Pennsylvania Supreme Court, after the submission of full briefs and oral argument granted the request of the will contestants that a new trial be held to ascertain whether the alleged last will of Paul Ciaffoni had been subjected to fraudulent tampering. The Court unanimously decided to treat the appeal of the new trial motions as a second application for reargument and expressly recognized the probative value of the documentary evidence of routine practice that had been submitted at the time of the first

trial. The ruling remanded the matter to Orphans' Court, to essentially begin the entire trial process anew.

9. June 1, 1982: Petitioner herein submitted a third application for reargument to the Pennsylvania Supreme Court. This unrecognized and unauthorized application was dismissed summarily by the Court on June 10, 1982, without any opinion.

10. September 3, 1982: Petitioner herein docketed a petition for writ of certiorari to the May 20, 1982 decision of the Pennsylvania Supreme Court granting a second application for reargument. The petition was docketed more than 90 days from the grant of the second reargument application which had occurred on May 20, 1982.

Certain criti al aspects of the foregoing chronology require amplification. First, the issues presented to the Pennsylvania Supreme Court in the course of the appeal of the denial of motions for new trial, nunc pro tunc (outlined in no. 6 above) were extremely broad. The essential thrust of the will contestants' case was that the alleged last will of Paul Ciaffoni had been subjected to fraudulent tampering.

To prove this, they had submitted every known will which had been drafted by Richard DiSalle, Esq., the alleged scrivener of the last will. The typing form and word usage from these wills were then analyzed and compared to the will submitted for probate. As a result of the comparison, it was evident that there were numerous variations between the established patterns of word usage and typewriting which typified the wills prepared by Richard DiSalle and the characteristics exemplified in the challenged will. Nonetheless, the trial judge excluded the evidence, primarily on the basis that it lacked probative value, especially when considered in light of the oral testimony of the scrivener and his secretary. (Pet. A7, A15) In the new trial motions, an important element of the after-discovered evidence consisted of additional comparison wills, prepared by Richard DiSalle, which had been admitted to public record only since the

end of the last trial. It was contended that these additional wills, in combination with the earlier proferred documents, sufficiently established the reliability and probative value of the evidence. The petitioners, in resisting this argument, devoted several pages of their brief to the proposition that neither the newly-discovered evidence, nor the quite similar evidence originally proffered, had any probative value. Excerpts from their brief, submitted to the Pennsylvania Supreme Court in January, 1982, in advance of oral argument, outlining this precise argument regarding the probative value of the submitted evidence, have been reproduced and attached to this brief in Appendix A-1, A-11 These excerpts very closely paraphrase the exact arguments they made before the Court at the time of the original appeal of the matter in April, 1980.

The appeal of the denial of the new trial motions also raised other important issues. It was alleged that the after-

discovered evidence demonstrated that the scrivener, DiSalle, committed perjury when he had testified that there were no established practices regarding will preparation in his office. Accordingly, this perjury, relied upon by the Court in making its determination to exclude the evidence of the will challengers, constituted a fraud upon the Court sufficient to justify the grant of a new trial. The final key issue raised especially seemed to be important. As mentioned, the alleged scrivener of the challenged will was Richard DiSalle. Since the time of the alleged draft of the will, Richard DiSalle had been elected and appointed to several Pennsylvania Courts, at both the trial and appellate level. DiSalle had been elected to the Washington County Court of Common Pleas and had served thereon for several years. He was then appointed to an intermediate level appellate court, the Commonwealth Court of Pennsylvania, where

he served for a short time until narrowly defeated in an election to retain the seat in November, 1979. Accordingly, he left the Commonwealth Court in January, 1980. Late in 1980, he was appointed by the Governor of Pennsylvania to a position on another intermediate level appellate court, the Superior Court of Pennsylvania where he served until again narrowly defeated in a state-wide election in November, 1981. During the 1 year interim period when DiSalle was off the appellate bench, he secured employment with the Pennsylvania Supreme Court in the capacity of "consultant" to that Court. It was later discovered that DiSalle was employed secretly by the Pennsylvania Supreme Court as a "consultant", presumably with access to the inner-workings of the Court, at the very time that the Court made their rulings affirming the exclusion of the evidence of fraud that had been offered against DiSalle. It was alleged that this secret

employment constituted an "appearance of impropriety", denied the will challengers their right to a fair and impartial appellate tribunal and hence violated their rights to due process of law under the United States Constitution.

On April 30, 1982, while the appeal of denial of the motions for new trial, nunc pro tunc, were pending, the will challengers instituted suit against the Pennsylvania Supreme Court and others in the United States District Court for the Western District of Pennsylvania (W.D. No. 82-779). The purpose of filing the suit at that time was to preserve the alleged due process violations against any argument that the statute of limitations would run. (The original decision of the Pennsylvania Supreme Court under challenge had been entered on April 30, 1980, exactly two years earlier.) The basis for Count 1 of the federal suit duplicated the due process argument raised in the motion

for new trial, nunc pro tunc. Specifically, it alleged that the secret presence of Richard DiSalle, as a consultant to the Pennsylvania Supreme Court, at the time of original appeal, with apparent access, to the inner workings of the Court, created an appearance of inpropriety in violation of the Pennsylvania Code of Judicial Conduct. This appearance denied the plaintiffs (Respondents here) their Constitutionally protected due process right to a fair and impartial tribunal.

Twenty days after the filing of the federal law suit, the Pennsylvania Supreme Court issued the unanimous per curiam order granting a new trial to the will challengers. The federal suit remains active, pending in part upon the outcome of the current appeal to this Court. Should this Court seek to overturn the decision of the State Court, count 1 of the federal suit will no longer be moot.

Reasons for Denying the Writ

Numerous technical and substantive reasons exist for denying the requested writ of certiorari.

I.

The Petition for Writ of Certiorari was not Filed Timely

The petition for writ of certiorari filed by Elizabeth Cowden, the petitioner, was not filed within the time required by Title 28, United States Code, Section 2101 (c).

As outlined in the chronology in the statement of the case, the original judgement was entered in this matter on April 30, 1980. A first application for reargument was denied on June 16, 1980. After full briefing and oral argument a second application for reargument was granted on May 20, 1982, vacating prior orders and remanding the matter to a trial court for a full trial upon the merits.

The petitioner is complaining about

the entry of judgement resulting from the grant of the second application on May 20, 1982. The petition for certiorari in fact was filed on September 3, 1982, according to the petitioner's affidavit of service. Accordingly, the petition was filed approximately 106 days after the grant of the second reargument application.

It is true that the petitioner attempted to file a third application for reargument with the Pennsylvania Supreme Court. As outlined in the earlier chronology, this was denied summarily, without any written opinion. The Rules of Appellate Procedure for Pennsylvania do not permit any party to file a third application for reargument as a matter of right. No effort was made to request the Court to modify their rules to allow for such a third application. The Pennsylvania Supreme Court gave no indication that it would treat the application as

proper. In view of the absence of any color of authority to justify the filing of a third application for reargument, such a filing may not be relied upon to justify an extension of the time period for docketing the petition for writ of certiorari.[1]

II.

The Petition for Writ of Certiorari to the Supreme Court of Pennsylvania Fails to Present a Substantial Federal Question

It is clear that the bedrock issue in this matter is whether the challengers in the will contest will have the opportunity to present their documentary evidence

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[1] A reading of the Petition for Writ of Certiorari makes it quite clear that the Petitioner believes that the grant of a second application for reargument, in apparent violation of express Pennsylvania Rules of Appellate Procedure, amounts to a violation of their due process rights under the Constitution of the United States. (Pet. 14-15) If the Petitioner strongly believes that a second reargument application is unauthorized, it is hard to see how they could rely upon the filing of a third application for reargument, apparently expecting the same to toll the applicable appeal period.

of habit, custom and routine practice in support of an allegation of fraudulent tampering to a fact-finder. The essential issues involve the probative value of the evidence in a probate proceeding. It has been held that matters of a state probate court, particularly evidentiary questions, are matters exclusively of state concern. This was recognized implicitly by this very Court when it refused a petition for writ of certiorari that had been docketed on or about November 13, 1980 in this very same matter. (Concetta Ciaffoni, et. al. Petitioners v. Elizabeth Cowden, et. al., Respondents, No. 80-775). At that time the then petitioners (now Respondents) had appealed from the Pennsylvania Supreme Court's ruling that their proffered evidence lacked probative value in the will contest. The fact that the state ruling has now been reversed, that the evidence has unanimously been found to possess probative

value, that a trial will be held on the question of will fraud, does not suddenly infuse the essential issues with a federal character. There is no ground for the U.S. Supreme Court to view the underlying dispute as presenting more of a substantial federal question than when certiorari was denied in 1980.

In a final, desperate attempt to stave off a hearing and to avoid coming to judgment, the alleged fraudulent conspirator (Petitioner here) belatedly has sought to cast a due process and equal protection gloss on the questions. The Petitioner argues that she was taken by surprise when the Pennsylvania Supreme Court reversed its earlier decision. She argues that she was not provided notice and opportunity to address the ultimate issue in the case - the probative value of the evidence against her. She argues that when the Court departed from its procedural rules it set her apart, in a unique class by herself, stripped naked

of the procedural protections upon which she had relied to avoid forever a meaningful trial on the question of her fraudulert acts.

Respondents take direct issue with the factual foundation upon which the Petitioner attempts to establish her alleged Constitutional claims. The Petitioner has claimed that the Pennsylvania Supreme Court decided an issue that was not before it on appeal and which had not been briefed or argued. (Pet. p. 4) The Petitioner also has stated that "(A)t no time was any brief submitted, or argument made, concerning the merits of the evidentiary rulings made during the 1978 trial, which had been the subject of the Pennsylvania Supreme Court's judgement in affirmance." (Pet., p. 10) Petitioner's claim has no support in the record.

Counsel has attached to the appendix of this reply verbatim extracts from

Elizabeth Cowden's brief to the Pennsylvania Supreme Court submitted in January, 1982, just before the oral argument held on January 18, 1982. Issue III in the brief is expressly entitled "The alleged newly discovered evidence is inadmissible on the subjects of linguistic and typing style of the decedent's will since the scientific community has never accepted the principles and techniques involved." For several pages Cowden's lawyers repeated the arguments that had earlier been put before the Pennsylvania Supreme Court indicating that isolating writing and typing characteristics from comparison wills had no probative value. (See Appendix, pp. A1-A11) Since the majority of the after-discovered evidence alleged in the new trial motions, consisted primarily of additional documents of the same type previously offered, the probative value of both the old evidence and the new evidence was necessarily at issue. As can be seen from excerpts from

their own briefs, the issue was addressed directly.2

Contrary to the petitioner's assertion that the issue of the probative value of the challenger's evidence of fraud has never been addressed by them in meaningful manner, they have presented their position at length and repeatedly:

1. Raised issue before the trial judge in September, 1978 appearing of record in the trial transcript.

2. Repeated issue before the lower court in briefs submitted in support of dismissing exceptions in August, 1979.

3. Repeated issue before Pennsylvania Supreme Court in the course of briefs and oral argument preceding the April 30, 1980 per curiam decision.

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2 Further, counsel addressed the issue at the January 18, 1982 oral argument. At the time of the oral argument, counsel submitted the proposition that no Pennsylvania Court at any time had ever written an opinion suggesting that the precedent relied upon by Justice Roberts in his written dissent of April 30, 1980 which supported the view that the will challengers' proffered evidence had probative value had ever been rebutted. Although no record of the oral argument was prepared to the counsel's knowledge, counsel is prepared to submit an affidavit on this point if requested by the Court.

4. Repeated issue in briefs before the Supreme Court, in opposition to appeal from dismissal of motions for new trial, treated by the Court as a second application for reargument in May, 1982.

5. Repeate issue in an unauthorized third application for reargument which was summarily dismissed by the Pennsylvania Supreme Court on June 10, 1982.

To now come before this Court and request yet another opportunity to present this same, old, tired, discredited argument regarding these obvious state issues, is the height of absurdity.

In raising the false due process questions, the petitioner objects to the Pennsylvania Supreme Court's reversal of its prior position, and labelling the procedure utilized to accomplish their goal as the grant of a second application for reargument. She claimed that such a procedure expressly is not authorized by the Pennsylvania Rules of Appellate Procedure and that it is therefore a violation of Due Process of law for the Pennsylvania Supreme

Court to follow such a procedure.

This position, which is the heart of the Petition, clearly lacks merit. A due process violation does not occur every time a court does not strictly comply with its procedural rules. It is always within the discretion of a court to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. American Farm Lines v. Black Ball Freight Service et. al., 397 U.S. 532 (1970)

The United States Supreme Court has decided a case virtually identical in all material respects to the errors alleged here. In Gondeck v. Pan American World Airways, Inc., 382 U.S. 25 (1965), this court specifically approved the granting of a second petition for rehearing, reversing an earlier and presumably final decision. The second petition for rehearing was granted, notwithstanding the provision in Supreme Court Rule 58 (4),

under which consecutive petitions for rehearings that are out of time, will not be received.[3] This per curiam opinion, expressing the views of six members of the Court, indicated that the interest in finality of litigation, expressed by appellate procedural rules limiting petitions for rehearings, must yield where the interest of justice would make unfair the strict application of that rule. Accord United States v. Ohio Power Co., 353 U.S 98 (1957), also cited by the Pennsylvania Supreme Court in their opinion here challenged (Pet. p. A1). Since the United States Supreme Court has utilized and approved precisely the same mode of procedure here under challenge, it is apparent that such departure from the strict application of the Rules of Appellate

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3 Former Supreme Court Rule 58 (4) is now renumbered as Supreme Court Rule 51.4. This Rule is virtually identical to Pa. R.A.P. 2547 in meaning.

Procedure does not amount to a violation of due process rights. Additionally, Pennsylvania Rule of Appellate Procedure 105 (a) expressly permits the state appellate courts to modify the strict application of their rules. The language of Pa. R.A.P. 105 (a), in relevant part, follows:

> In the interest of expediting decision, or for other good cause shown, an appellate court may,... disregard the requirements or provisions of any of these rules in a particular case... on its own motion and may order proceedings in accordance with its direction.

It is equally clear that the petitioner had no vested rights in the 1980 decision of the Pennsylvania Supreme Court. It has long been settled that the mere fact that a court reverses its former decision, to the prejudice of one of the parties, does not serve to deprive that party of his property without due process of law. Tidal Oil Co., et. al., v. Flanagan, 263 U.S. 444 (1924). Accord J.H. Baumann, et. al., v. Robert V. Smrha,

145 F. Supp. 617 (D.C. Kan., 1956), affirmed at 352 U.S. 863 (1957).[4]

In evaluating this petition for writ of certiorari, it is important to note the overall effect of the decision of the Pennsylvania Supreme Court. The Court simply ruled that, since the proffered evidence of fraud had probative value, the matter should be heard fully by a fact-finder. (Pet., p. A3) In effect, the ruling places the issues at the beginning of the litigation process. All parties will have full rights to present any proper evidence or make any valid argument relative to the issues. There has been absolutely no decision on the merits of the case. How are due process rights violated when the effect of a ruling is to give all parties

[4] The Pennsylvania Supreme Court made a specific finding that there was no substantial prejudice to the parties resulting from its decision to vacate its earlier decision since there had been no final distribution pursuant to the probated will. (Pet., p. A3)

the right to present probative evidence to a fact-finder? How are due process rights violated when the merits of the underlying dispute have not been resolved? The order here challenged directs that a full hearing be held, not that a full hearing be denied. The goal of the petitioner's appeal is to extinguish the new trial and to prevent a full hearing. The due process violation would occur only if the petitioner is successful in asserting technical rules to deny to the respondents an opportunity to present their probative evidence of fraud to a fact-finder.[5]

Actually, the relief requested by the petitioners at this point in the appeal process, demonstrates further the frivolity

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[5] A study of the Pennsylvania Supreme Court's order, directing that this matter be remanded for a new trial, should demonstrate that the issues here presented are not ripe for appeal. The order starts the trial process anew. The order is not final with regard to any legitimate and material issue. The parties are placed in the same position as they would have been if the case had never been tried South Pacific Co. v. Gileo, 351 U.S. 493 (1956).

of their position. She appears to have requested merely to have the opportunity to present her arguments regarding the probative value of the evidence to the State Supreme Court yet one more time. (Pet., p. 22) As outlined, the State Supreme Court has reviewed this issue on at least three occasions. The most recent ruling by the Court was unanimous. A fourth review by the State Court would be a complete waste of judicial resources. The petitioner is not really challenging the State Court's overall judgment of the case. She is seizing upon the wording of the last opinion. Full briefing and oral argument undeniably was held on the appeal of the denial of the motions for new trial, nunc pro tunc. The issues there presented necessarily included a review of the probative value of the evidence of fraud. In their opinion, the State Supreme Court expressly noted that it also had fully reviewed the

record presented at the time of the first appeal in 1980. (Pet., p. A2) Accordingly, if the Supreme Court is to be believed, they were fully aware of all the arguments ever presented on the questions of the probative value of the evidence when they rendered their decision on May 20, 1982.

The Pennsylvania Supreme Court, in choosing to treat the appeal as a second application for reargument, simply streamlined the issue. Their choice of procedural framework had absolutely no effect regarding their decision on the underlying merits and the breadth of arguments they considered.

Even if this Court held the opinion that the Pennsylvania Supreme Court committed error in their interpretation of state procedural rules, it is clear that the issue would not be proper for federal court jurisdiction. As this Court stated in United Gas Public Service Co. v. Texas, et. al., 303 U.S. 123, (1938), at p. 139:

> With respect to the proceedings in the state courts, appellant urges that the case was not tried and determined as required by state law, and we are referred to the state statutes and decisions of the Texas Courts as to the proper procedure in the trial court and on appeal. It is not our function in reviewing a judgement of the state court, to decide local questions. We are concerned solely with asserted federal rights. The final judgment of the state court in the instant case must be taken as determining that the procedure actually adopted satisfied all state requirements. (emphasis added)

The cases cited by the petitioner to indicate that the state procedure here followed violated due process are all inopposite. The cases cited all involved the absence of a meaningful hearing prior to a state ruling.[6] Here, the issues were presented prior to the state court's decision. Further, the state court ruling guarantees

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[6] Fuentes v. Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S 337 (1969) and others in footnote 12 of the Petition.

parties will be provided a meaningful opportunity to be heard at a full trial rather than denied an opportunity to be heard. The issues here raised are merely questions of state court procedure, with no credible due process issue.[7]

The Petitioner also has sought to cloak her objections to the state court's interpretation of its own procedure, in the rubric of

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[7] Another reason for this Court to be extremely reluctant to interfere with the State Court's decision to grant a new trial is related to the lawsuit filed by the respondents herein in federal district court. As outlined in the statement of the case, the gravaman of Count 1 of the suit is that, at the time of the initial state court appeal in April, 1980, Richard DiSalle (alleged scrivener of the challenged fraudulent will) was secretly employed as a "consultant" to the State Supreme Court. The instant new trial was granted twenty days after the filing of the federal suit against the state court. The Justices of the State Supreme Court uniquely would be aware of what role, if any, DiSalle played in the initial appellate decision. Their decision to grant a new trial, effectively mooting count 1 of the federal suit, cannot be viewed as an abuse of discretion under all the circumstances.

equal protection doctrine. She asserts that she alone has been treated differently from all other state court litigants. She states that everyone else may rely upon a supposed inflexible state doctrine, entitled "the law of the case", and that the state court has never before considered modifying its rules to allow a second application for reargument. (Pet., pp. 22-24) Reference to decisions interpreting the state law demonstrate that these positions also lack merit.

The phrase "the law of the case" expresses only the general position of courts not to reopen what they have already decided. But clearly the doctrine is not a limitation on their power. The rule of "the law of the case" is one largely of convenience and public policy, and it must be accommodated to the needs of justice. Where a prior decision is palpably erroneous, Pennsylvania State Law allows a court, as

a matter of grace, to correct it upon a second review. Reamer's Estate, 331 Pa. 117, 200 A.35 (1938). Accord Burke v. Pittsburgh Limestone Corp., 375 Pa. 190, 100 A.2d 595 (1953)

The use of the procedural device of a second application for reargument, in modification of the Pennsylvania Rules of Appellate Procedure also has previously been given express approval by the Pennsylvania Supreme Court. The case recognizing the use of such a procedure, Aiken Industries Inc. v. Wilson, 482 Pa. 625, 394 A.2d 497, (1978), also was cited specifically by the Pennsylvania Supreme Court in their ruling here under challenge. (Pet. p. A1).

The doctrines relied upon by the petitioner to argue that she has been denied the equal protection of the law show precisely the opposite. The doctrines demonstrate that the law has flexibility and that rules must be accommodated to address the unique individual circumstances

presented by each case. The state supreme court has not singled out the petitioner for special, unprecedented treatment. In the proper exercise of their discretion, to correct a previous injustice, they have not created a forlorn class or group of individuals to be denied substantive procedural protections. Try as she might, the petitioner has raised no proper ground to justify this Court's interference with procedural matters which are exclusively the concern of the Pennsylvania Supreme Court. Such interference would serve only to create uncertainty as to a state court's discretion to promote the ends of justice in any given individual case.

III.

No Federal Issue Was Preserved in the State Court

The so-called federal issues raised in the petition for writ of certiorari were presented for the first time in a

third application for reargument. The petitioner took issue with the manner in which the Pennsylvania Supreme Court had granted a second application for reargument. On June 10, 1982 this third application for reargument was dismissed summarily by the Pennsylvania Supreme Court, without any opinion whatever.

The Pennsylvania Rules of Appellate Procedure do not permit the filing of third application for reargument. No motion to modify the Rules for Appellate Procedure for such a third application was made or granted.[8] In these circumstances it must be said that this third application for reargument was a complete nullity, totally unrecognized in state law. It was contended earlier in this

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8 The lack of permission by the Pennsylvania Supreme Court distinguished the unauthorized third application for reargument, from the second application for reargument which actually was expressly authorized by that Court.

brief that such a nullity could not be relied upon to extend the time for docketing a petition for writ of certiorari in this Court. It should equally be evident that such an unrecognized nullity can not be relied upon to preserve federal issues.

After the court of last resort of a state has pronounced its decision, it is too late to raise a federal question for the first time in a petition for rehearing. If the order of court is nothing more than a denial of the motion, the decision will not be reviewed by the United States Supreme Court. The decision will be reviewed only if the court entertains the motion and passes upon the federal question. This includes claims of denial of due process and deprivation of equal protection as a result of a state court decision. Consolidated Turnpike Co. v. Norfolk and O.V.R. Co., 228 U.S. 326 (1913); Tidal Oil Company

et. al. v. Flanagan, supra; Bloeth v. State of New York, ___ U.S. ___, 82 S.Ct. 661, 7 L. Ed.2d 780 (1962).

Conclusion

For the reasons set forth above, the respondents herein submit that a writ of certiorari should not be granted in this case.

Respectfully submitted,

Peter M. Suwak

Peter M. Suwak
Attorney for Respondents

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE:	:	
	:	
ESTATE OF	:	NO. 81-1-32
PAUL CIAFFONI,	:	
	:	NO. 81-1-79
	:	
Deceased	:	

BRIEF OF APPELLEE

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COUNTERSTATEMENT OF ISSUES PRESENTED

1. Are publicly filed documents, which were known by the appellants to have existed prior to trial but not used at trial, which are merely cumulative of evidence which was originally rejected by the trial court, and which are being produced merely to impeach the credibility of witnesses who testified at trial, documents which constitute "newly discovered evidence" for purposes of granting a motion for new trial?

2. Where evidence was ruled inadmissible at trial, which ruling was affirmed by the Supreme Court of Pennsylvania, does the mere fact that additional inadmissible evidence is now produced require that a new trial be granted?

3. Has there been an appearance of impropriety created by any Court in connection with this litigation?

III.

THE ALLEGED NEWLY DISCOVERED EVIDENCE IS INADMISSIBLE ON THE SUBJECTS OF LINGUISTIC AND TYPING STYLE OF THE DECEDENT'S WILL SINCE THE SCIENTIFIC COMMUNITY HAS NEVER ACCEPTED THE PRINCIPALS AND TECHNIQUES INVOLVED

In order to grant a new trial for newly discovered evidence, it is necessary that the evidence be admissible. McDermott v. Marlow, 336 Pa. 337, 9 A.2d 420 (1939). The evidence proposed to be introduced if a new trial is granted would not be admissible.

Prior to the trial of this case, the appellants caused alleged experts engaged by them to examine approximately 50 wills probated in the Washington County Register of Wills office, which wills were in backers bearing the name "Richard DiSalle." The appellants contended that each of these 50 Wills was prepared by Richard DiSalle before he ascended to the bence and while he was a

practicing attorney in Washington County; and, that the Wills were typed by his secretary, Frances Gray. The experts proposed to testify on two topics:

(1) certain typing characteristics allegedly present to a different extent in the decedent's Wills than in the comparison Wills;

(2) certain linguistic or stylistic characteristics also allegedly present to a different extent in the decedent's Will than in the comparison Wills.

The trial Court correctly excluded the proffered testimony. The additional documents discovered since trial, and purportedly evidencing the same discrepancies, would also be inadmissible.

The appellants alleged at the original trial, and the appeal following that trial, that the 50 or so wills examined by them were sufficient to permit a valid comparison

between them and the decedent's Will. The evidence at trial contradicted that assertion on several grounds. First, it was not and could not be shown that the same typist prepared each of the comparison wills. Frances Gray testified that replacement secretaries worked in the office when she took vacations or was ill. She also testified that her vacation schedule was irregular, and that different replacement secretaries would be hired during her vacations. Accordingly, it is impossible to determine which of the original comparison wills would have been typed by her, and how many and which of them were typed by various temporary replacements. The "newly discovered" documents are subject to the same critical analysis. In the absence of any certainty about the identity of the typist of the comparison documents, it would be impossible for the factfinder to reach any conclusions based on the comparison of typing samples.

Second, the appellants did not and could not identify any readily distinguishable features for comparison. The evidence at trial established that Richard DiSalle did not have an established format or style manual for typewritten work produced in his office. Mrs. Gray testified that she would alter her typing style for longer documents, and the Will of Paul Ciaffoni is longer than any other will proffered by the appellants.

The most important reason for excluding the proffered evidence concerning the linguistic or typing style of the decedent's Will is that it is derived from an earlier will prepared by another attorney. Richard DiSalle testified that the present Will was a revision of a Will he prepared for the decedent in 1967, and that the 1967 Will was itself a revision of a Will prepared for the decedent in 1965 by Patrick Derrico, Esquire. The decedent's Will is, therefore, the product of the drafting techniques of two different

attorneys, and even the most reliable analytical techniques would be valueless in comparing it to other wills or deeds prepared solely by Richard DiSalle.

The testimony adduced at trial clearly establishes that, far from expecting similarties among the proffered typing samples, any comparison would probably reveal differences between the decedent's Will and the comparison wills. The evidence would exclude the drawing of inferences about the identity of the drafter or typist of the decedent's Will.

At trial, the appellants made various offers of proof to introduce testimony of alleged "experts" who would compare the decedent's Will with the comparison wills, to show that the comparison wills had different typing and linguistic characteristics. However, there was nothing in the offers of proof as to any of these proposed witnesses which would establish that what

they did was in any way scientific. If there is any significance at all to the use or non-use of certain techniques, where the frequency with which words, phrases or stylistic items occur, this significance was never offered by the appellants' counsel. In particular, it was never shown that the whole concept of measuring the frequency of words or phrases from one document to another has any scientific acceptance whatever.

No analytical technique can form the basis for expert testimony unless experts generally regard that technique as scientifically valid, so that it's use is meaningful. No such validity was offered to be proven in the appellants' proposed at the original trial, and no such technique is proffered in the Motions for New Trial. In Commonwealth v. Topa, 471 Pa. 223, 369 A.2d 1277, this Court reaffirmed that the threshold question must always be whether or not the proffered "expert testimony" has acheived scientific acceptance. In Topa,

this Court stated:

> [a]dmissibility of [scientific] evidence depends upon the general acceptance of its validity by those scientists active in the field to which the evidence belongs. Id, 471 Pa. at 231, 369 A.2d at 1281 (1977) (emphasis in original).

Since there is no evidence to support the proposition that there ever has been general acceptance of the typing and linguistic analysis offered by the appellants' experts, the exclusion of their proffered testimony was completely proper at trial.

The exclusion of the allegedly "newly discovered evidence" would also be compelled. It has already been shown that Kane's Estate, supra, ans Lare's Estate, supra, are irrelevant to the issue presented in this case; that is, whether the evidence would be admissible under any circumstances. It is clearly inadmissible. Scientific acceptance of the appellants' proposed evidence does not exist. The test of admissibility is set forth in Commonwealth v. Topa,

supra. That case quoted with approval the earlier case of Frye v. United States, 293 F. 1013 (D. C. Cir. 1923) which held:

> ...while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principal or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. Id., at p. 1014.

Nothing cited by the appellants in their Brief points to scientific acceptance of the so-called typing elements or linguistic analysis which the appellants wish to propound. Even if it did, the uncontroverted fact remains that the appellants did not and cannot prove that Mrs. Gray typed the comparison wills. Without that basic foundation, the appellants' evidence is meaningless.

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No. 82-428

IN THE

Supreme Court of the United States

October Term, 1982

ELIZABETH CIAFFONI COWDEN, Trustee of the Estate of PAUL CIAFFONI,

Petitioner

v.

CONCETTA CIAFFONI, ROBERT J. CIAFFONI,

Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITIONER'S REPLY MEMORANDUM

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No. 82-428

IN THE

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Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITIONER'S REPLY MEMORANDUM

In their Brief in Opposition, Respondents argue that: (1) the Petition For Certiorari was not timely filed; (2) Petitioner failed to present a substantial federal question; and (3) Petitioner failed to preserve the right to raise any federal constitutional issue in this Court. Rather than address the substantive merits of the questions presented to this Court, Respondents have disingenuously attempted to becloud the issues and divert this Court's attention from the substantial due process and equal protection claims advanced in the certiorari petition.

It is respectfully submitted that the postures taken by Respondents are erroneous, not only by their total disregard for the true procedural history of this case and this Court's rules, but also by their utter inability to appreciate the soundness of Petitioner's clearly articulated constitutional arguments. For all of the reasons set forth, as well as those set forth in the Petition itself, Petitioner submits that the requested Writ should issue.

1. In urging denial of the instant Petition, Respondents deliberately seek to confuse the facts that (a) they unsuccessfully filed an application for reargument in the Pennsylvania Supreme Court which was denied on June 16, 1980, and (b) the Pennsylvania Supreme Court, as reflected in its May 20, 1982 Judgment, *sua sponte* treated Respondents' consolidated appeals from the trial court's denials of two Motions for New Trial, *Nunc Pro Tunc*, as a second application for reargument, with the fact that (c) Petitioner timely sought reargument after the Pennsylvania Supreme Court, on May 20, 1982, took the unprecedented step of reversing a two year old final judgment. The unconstitutional manner in which the Supreme Court of Pennsylvania reversed itself led to the due process and equal protection deprivations advanced in support of the certiorari petition.

Pursuant to Supreme Court Rule 20.4, Petitioner timely filed the instant Petition within ninety (90) days of the Pennsylvania Supreme Court's June 10, 1982, *per curiam* order denying Petitioner's *first* and *only* application for reargument. Respondents' contrary assertion is therefore legally untenable and particularly so as the Clerk of this Court is empowered, pursuant to Supreme Court Rule 20.3, to refuse "to receive any petition for a writ of certiorari which is jurisdictionally out of time." A review of the procedurally accurate statement of the

case (Petition at 4-12) undeniably reveals that the Clerk properly docketed the Petition as it was filed well within the statutorily prescribed time. *See* 28 U. S. C. § 2101(c); Supreme Court Rule 20.2. Thus, Respondents' own admission concerning the glaring procedural irregularities below, only highlights the necessity for this Court's review.

2. Respondents' putative substantive reasons urging that this Court deny the instant Petition demonstrate a desperate attempt to avoid this Court's review. Instead of addressing the constitutional due process and equal protection violations here raised, Respondents chose to ignore those clearly articulated bases for the invocation of this Court's certiorari jurisdiction. Respondents designed decision to relegate fundamental constitutional principles to a textual note (Brief in Opp., at 29 n. 6), coupled with their overt failure to comprehend the very basic constitutional precepts advanced in the instant Petition, only underscores the total vacuousness of their present position. Moreover, by conflating the purely state law evidentiary questions, which are not here at issue, with the federal constitutional questions actually advanced and which remain unanswered, Respondents have chosen to becloud the record and obfuscate the meritorious claims presented for review by this Court. This Court should reject such posturing as an ill-conceived effort to divert this Court's judicious attention from deciding the substantive and procedural constitutional questions at issue.

3. Finally, Respondents' contention that the federal constitutional issues here advanced were not preserved below must be soundly dismissed as depending on a palpably erroneous premise. It is evident that Petitioner

raised those issues presently before this Court when Petitioner moved for reargument in the Supreme Court of Pennsylvania—and could only and did only raise those issues after that Court took the unprecedented action complained of, which action created the constitutional error here at issue. The precise unconstitutional action advanced as a basis for granting this Writ was timely brought to the attention of the Pennsylvania Supreme Court, which Court summarily denied Petitioner's application for reargument. Petition at 2, 11. Because it is demonstrably apparent that Respondents' argument is devoid of any logical or legal merit, it must be cast aside.

In sum, by their refusal to respond, on the merits, to the instant Petition, Respondents exhibit an astounding insensitivity to Petitioner's legitimate interests and to this Court's historical exercise of its certiorari jurisdiction to prevent the encroachment by the States of federally secured rights; and, underscores the need for consideration of the advanced constitutional issues by this Court. The fair and orderly administration of justice requires nothing less.

Respectfully submitted,

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